No. 33379-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JAMES and DEBORAH SHARBONO, individually and the marital community thereof; CASSANDRA SHARBONO,

Respondents/Cross-Appellants,

vs.

UNIVERSAL UNDERWRITERS INSURANCE COMPANY, a foreign insurer;

Appellant/Cross-Respondent,

and

LEN VAN DE WEGE and "JANE DOE" VAN DE WEGE, husband and wife and the marital community composed thereof,

Cross-Respondents.

BRIEF OF APPELLANT/CROSS-RESPONDENT UNIVERSAL UNDERWRITERS INSURANCE CO.

Dan'L W. Bridges, WSBA #24179
Law Offices of Dan'L W. Bridges
11100 Northeast 8th Street, #300
Bellevue, WA 98004-2912
(425) 818-4880

Philip A. Talmadge, WSBA #6973
Talmadge Law Group PLLC
18010 Southcenter Parkway
Tukwila, WA 98188-4630
(206) 574-6661

Attorneys for Appellant/Cross-Respondent
Universal Underwriters Insurance Company

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Table of Cases

Washington Cases

Other Cases

Statutes

Rules and Regulations

A. INTRODUCTION

The trial court made a series of incorrect decisions on summary judgment and then conducted a bad faith "trial" that was unfair to Universal Underwriters Insurance Company (Universal), resulting in a judgment against the company of more than $9.6 million.

Universal issued two policies to the Sharbonos for their transmission businesses. These policies provided distinct umbrella coverages for their personal and commercial liability and banned stacking of policy limits. When the Sharbonos' teenaged daughter killed Cynthia Tomyn, the driver of an oncoming car who was a young mother of three children, the trial court ignored the express policy provisions, finding coverage under the *commercial* umbrella part of two policies for the Sharbonos' daughter's conduct although she was using a personal, not commercial, vehicle for personal, not business, purposes. The trial court then allowed the Sharbonos to stack the two commercial umbrella limits with the personal umbrella limit, despite the antistacking provisions in Universal's policies.

To compound its misreading of the policies' coverages, the trial court ruled Universal was guilty of bad faith as a matter of law for violating WAC 284-30-330(7), when it refused to turn over its underwriting file either to Ms. Tomyn's estate or the Sharbonos. At a

minimum, whether an insurer committed bad faith is classically a question of fact. In this case, as a matter of law, Universal did not engage in bad faith conduct by disputing whether it was obliged to turn over its file. Moreover, the Sharbonos could not prove that file or its contents in any way altered the resolution of the Tomyns' case against the Sharbonos.

The trial court's conduct of the trial on bad faith virtually assured a substantial verdict for the Sharbonos. The trial court allowed the jury to know of a trial court ruling requiring Universal to turn over its underwriting file, but not this Court's ruling granting review of that decision under RAP 2.3(b). It permitted the attorney for the Tomyns, the Sharbonos initial counsel, and a guardian ad litem to act as expert witnesses for the Sharbonos. The trial court instructed the jury on bad faith, but glossed over the fact the Sharbonos still needed to prove harm proximately caused by the lack of access to Universal's file. The trial court used an improper instruction on proximate cause. The jury rendered an excessive verdict on the Sharbonos' alleged emotional distress, despite a settlement between the Sharbonos and the Tomyn estate that completely exonerated the Sharbonos from any personal liability.

This is a case in which a pliant trial court allowed the Sharbonos to conduct a trial that abused Universal's right to a fair trial. The trial court's escalating errors on coverage and bad faith resulted in an enormous

verdict of more than $9.6 million that is completely unjustified. This Court should rectify the trial court's multiple erroneous rulings on coverage, bad faith, and damages.

B. ASSIGNMENTS OF ERROR

(1) Assignments of Error

1. The trial court erred in granting plaintiffs' motion for partial summary judgment on December 27, 2002.

2. The trial court erred granting the Sharbonos the right to stack the umbrella coverage limits in the Universal policy by its January 24, 2003 order.

3. The trial court erred in approving the reasonableness of the Sharbonos' settlement with the Tomyns on May 2, 2003.

4. The trial court erred in entering its order on cross motions for summary judgment on March 30, 2005.

5. The trial court erred in denying admission of this Court's May 3, 2001 ruling into evidence.

6. The trial court erred in allowing Maureen Falecki to testify as an expert witness when she was not disclosed as an expert, and in allowing her to speculate on the effect of the underwriting file on settlement and to testify to matters she had previously claimed as work product.

7. The trial court erred in allowing Ben Barcus to testify as an expert witness when he was not disclosed as an expert, and in allowing him to testify selectively on matters he had claimed were work product.

8. The trial court erred in allowing David Bufalini to testify as an expert witness when he was not disclosed as an expert.

9. The trial court erred in allowing testimony of what transpired in two mediations.

10. The trial court erred in giving Instruction Number 5 to the jury.

11. The trial court erred in giving Instruction Number 12 to the jury.

12. The trial court erred in giving Instruction Number 13 to the jury.

13. The trial court erred in failing to give defendants' proposed instruction N to the jury.

14. The trial court erred in entering the judgment on the verdict of the jury on May 20, 2005.

15. The trial court erred in entering its order regarding attorney fees, costs, and treble damages on May 20, 2005.

16. The trial court erred in denying Universal's motion for remittitur or a new trial on general damages on June 17, 2005.

(2) Issues Pertaining to Assignments of Error

1. Did the trial court err in finding insureds were entitled to coverage under a commercial umbrella liability insurance policy provision for a death arising out of the non-business operation of a family vehicle for personal purposes by their 16-year-old daughter? (Assignments of Error Numbers 1, 14, 15)

2. Did the trial court err in allowing insureds to stack limits under two commercial umbrella liability insurance parts in two policies and a personal umbrella liability insurance part in one of the policies, although the policies each contained express antistacking provisions? (Assignments of Error Numbers 2, 4, 14, 15)

3. Did the trial court err in ruling as a matter of law an insurer acted in bad faith in refusing to disclose some of its internal underwriting documents, particularly where this Court implied a trial court order compelling the insurer to turn over the file was erroneous as it had granted discretionary review of that ruling? (Assignments of Error Numbers 4, 14, 15)

4. Did the trial court abuse its discretion in finding a settlement between the plaintiffs and an insurer's insureds to be reasonable in light of the *Chaussee* factors? (Assignment of Error Number 3)

5. In a trial on an insurer's alleged bad faith in refusing to disclose portions of its internal underwriting file, did the trial court abuse its discretion in refusing to admit an appellate court commissioner's ruling granting discretionary review on the issue when it allowed the trial judge's impliedly erroneous ruling into evidence? (Assignment of Error Number 5)

6. Did the trial court abuse its discretion in allowing witnesses not listed as expert witnesses in a party's disclosure of witnesses to testify to opinions on coverage, bad faith, or the effect of the underwriting file on settlement? (Assignments of Error Numbers 6-8)

7. Did the trial court abuse its discretion by allowing testimony of what transpired at mediations despite principles of mediation confidentiality set forth in RCW 5.60.070 and ER 408? (Assignment of Error Number 9)

8. Did the trial court effectively direct a verdict on bad faith in favor of the insureds when it instructed the jury to consider its earlier irrelevant rulings on coverage and its ruling that an insurer acted in bad faith, but its instruction neglected to clearly advise the jury that the issues of proximate cause and damages remained to be resolved by the jury? (Assignment of Error Number 10)

9. Did the trial court err in instructing the jury in an insurer bad faith case on proximate cause by using the "substantial factor" formulation for proximate cause? (Assignments of Error Numbers 11, 13)

10. Were the damages awarded by the jury on emotional distress so excessive as to indicate they were the product of passion and prejudice? (Assignments of Error Numbers 12, 14-16)

C. STATEMENT OF THE CASE

In 1997, plaintiffs Jim and Debbie Sharbono owned three transmission shops called "All Transmission & Automotive," "the Trans-Plant," and "Parkland Transmission." RP 221-22, 233. They had business partners in the latter two dealerships: Mr. and Mrs. Clarence Ray in Trans-Plant, and Mr. and Mrs. Robert Huke in Parkland. RP 233-35.

In the mid-1990s, the Sharbonos and their partners bought commercial insurance coverage from Universal, an insurer based in Overland Park, Kansas that specializes in insurance for automobile dealers, auto repair shops, and associated enterprises. RP 1194-95. Universal agreed to insure the three transmission shops under separate (but similar) commercial package policies; the All Transmission & Automotive

policy is in the record at CP 31-169 and is Exhibit 54; the Trans-Plant policy is in the record at CP 171-305.[1]

In 1997, the Sharbonos approached their Universal sales agent, Len Van de Wege, about transferring the family's personal umbrella coverage from State Farm to Universal. RP 263-67, 1434-37.[2] Universal does not sell personal lines policies *per se*, but offered personal umbrella coverage as an adjunct to its commercial policies for the convenience of its customers like the Sharbonos. RP 1435-36, 1622. The Sharbonos contend they initially asked Van de Wege to provide them with $3 million of personal umbrella coverage. RP 1135-36. The Sharbonos contend Van de Wege allegedly agreed to incorporate a $1 million personal umbrella coverage into each of the three transmission shop policies, explaining they could "stack" the three $1 million coverages for a total of $3 million in personal umbrella coverage. RP 264-67. Van de Wege denies the Sharbonos sought $3 million in personal umbrella coverage. RP 1437-38, 1626; Ex. 31.

---

[1] The Sharbonos conceded below that they had no coverage under the Parkland Transmission policy because they were not named insureds in that policy. CP 316.

[2] Prior to doing business with Universal, the Sharbono family had all their personal insurance with State Farm, including a $2,000,000 personal umbrella policy. RP 1135. The Sharbonos maintained an automobile liability policy with State Farm with limits of $250,000, as well as coverage for their motorhome, and homeowners insurance. CP 42; Ex. 17-18.

The contemporaneous documents contradict the Sharbonos' contentions. Until 1997, the Sharbonos carried their personal umbrella insurance with State Farm, with limits of $2 million; that year, they asked Van de Wege if Universal would sell them personal umbrella coverage because State Farm would no longer insure their property. RP 1135, 1434-36. Van de Wege agreed to do so, and Mrs. Sharbono signed a two-sided application on February 7, 1997 for a $2 million personal umbrella policy – the same limits the couple had with State Farm – excess only to their own homeowners (not auto) policies. Ex. 1. That document shows Mrs. Sharbono did not initially ask for $3 million in coverage, or even for three $1 million policies; rather, she sought $2 million in personal umbrella limits, mirroring her existing State Farm coverage. Ex. 1.[3] Van de Wege saw Mrs. Sharbono write "$2 million" on Exhibit 1. RP 1464-67. The contemporaneous documentation also demonstrates Van de Wege notified Mrs. Sharbono in writing that: "We need to issue only one

[3] After being confronted with Exhibit 1, an application for $2 million in personal umbrella coverage, Deborah Sharbono claimed the $2 million notation on the document was not her handwriting, RP 1672, 1684, even though the handwriting bore a remarkable resemblance to that in Exhibit 42, a document she acknowledged was hers. RP 1672-73. She also changed her testimony and claimed there were three applications for personal umbrella coverage. RP 1526, 1672. Mrs. Sharbono made no copies of the other two phantom applications and never produced them at trial. RP 1737-39, 1742. By contrast, she kept copies of other key documents. RP 1741. Maureen Falecki, an attorney for the Sharbonos, never received any documents from the Sharbonos supporting their contention they asked for $3 million in coverage. RP 741. Her answers to interrogatories never mentioned three applications. RP 1682-83.

personal umbrella policy for you and Jim, rather than have one on each of the business policies." Ex. 11.[4] Van de Wege confirmed the $2 million limits in that July 7, 1997 facsimile. *Id.* The Sharbonos did not object to that fax or call Teri Hasegawa at Universal to complain about insufficient limits. RP 1158-59. Similarly, the Sharbonos never indicated in the coverage reviews or in calls to Van de Wege any disagreement about those limits. RP 1323, 1470-71, 1484-86, 1525; Ex. 3-5. They paid premiums on $2 million in coverage limits. RP 1474.

At the time of renewal in 1998, the Sharbonos decided to add their motor vehicles to their personal umbrella coverage, RP 1330, and Mrs. Sharbono asked Van de Wege to decrease the personal umbrella limit to $1,000,000 because of the added premium for such coverage. RP 1486; Ex. 18. She signed a new application in that amount on October 13, 1998. Ex. 17-18.[5] The Sharbonos paid premiums on $1 million in coverage. RP 1489.

---

[4] Universal's personal umbrella coverage was *personal* to insureds like the Sharbonos, giving them added insurance limits beyond those applicable to personal auto liability or homeowners coverage. RP 1441. Such coverage had nothing to do with the insurance applicable to the various Sharbono businesses. RP 1439.

[5] Because the Sharbonos delayed submitting the documentation necessary to obtain a personal umbrella policy in 1998 (they failed to submit proof of their underlying coverage), RP 1326-29, 1490-91, the Sharbonos actually had no personal umbrella coverage in effect on December 11, 1998 under the All Transmission & Automotive policy. RP 1175-76, 1178. Van de Wege had Mrs. Sharbono prepare an additional personal umbrella coverage application to be certain the Sharbonos had coverage. RP 1500, 1503; Ex. 17. Universal, nevertheless, retroactively provided coverage under the

At the same time, the Sharbonos' business partners (the Rays and Hukes) applied for their own personal umbrella insurance at the Sharbonos' insistence, filling out their own $1,000,000 applications identical to the Sharbonos' in November of 1998. Ex. 34, 35. The Sharbonos were insureds under the All Transmission & Automotive policy, the Rays under the Trans-Plant policy, and the Hukes under the Parkland policy, with each family carrying $1,000,000 of personal liability insurance. Ex. 18, 34, 35. Nothing on the applications indicated the Sharbonos were entitled to any coverage under the Trans-Plant or Parkland policies for the personal umbrella coverage. Ex. 18, 34, 35. The policies provided distinct *commercial* umbrella coverages for each of the businesses. RP 1318; CP 119-28, 255-64. The policies corresponded to the particular business in which the Sharbonos, the Rays, and the Hukes were the principals. RP 898-902.[6]

On December 11, 1998, Cassandra Sharbono, who turned sixteen in April, was driving the family's pickup on SR 7 with a high school friend as a passenger during a heavy rain. CP 659-65, 677. Neither

---

$1 million personal umbrella policy requested in the Sharbonos' application. RP 1198. Although the Sharbonos had not fulfilled all of their obligations in the application process, they had signed an application form before the accident.

[6] Despite two account reviews in 1997 and 1998 with Van de Wege on a face-to-face basis, the Sharbonos never complained specifically about any errors in their personal umbrella coverage limits, and signed off on the review summaries. Ex. 3-5.

Cassandra nor her friend was wearing a seatbelt. CP 673-74.[7] Cassandra was not on company business as she was driving her friend, Jillian Newkirk, to work. CP 659. She was not paying attention when traffic stopped ahead of her; a car lost control in front of her and she locked up the brakes in a panic stop when she saw the red taillights. CP 659, 661, 670-72. Her truck swerved into the oncoming traffic and struck an approaching car head-on, killing Cynthia Tomyn. CP 467, 669, 671-72. Ms. Sharbono was cited for negligent driving in the second degree. CP 551. Mrs. Tomyn, age 34, was survived by her husband Clint and their three minor children. CP 519-20.

Immediately after the accident, the Tomyn family retained attorney Ben Barcus to pursue a wrongful death claim against the Sharbonos. RP 776.

Through their respective counsel, the Tomyns and the Sharbonos then went through prolonged negotiations in 1999 and 2000 regarding the Tomyns' claim. State Farm provided defense counsel, Dennis LaPorte of Krilich, LaPorte, West & Lockner, P.S., to the Sharbonos. RP 328; Ex. 117. State Farm recommended that the Sharbonos consider retaining their own counsel as their exposure exceeded the applicable insurance coverage limits. Ex. 39. Mr. LaPorte also recommended independent counsel. Ex.

[7] Cassandra claimed she was wearing a seat belt. CP 660.

117. The Sharbonos hired Timothy Gosselin and Maureen Falecki of the Burgess Fitzer firm to represent them. RP 320-22, 330, 624-25.

In a series of letters commencing in August, 1999, Ms. Falecki sought production from Universal of documents pertaining to the Sharbonos' insurance coverage. Ex. 22, 23, 29, 56, 61, 116. In response, Universal, through its claims manager, Jack Peckenpaugh, provided the Sharbonos with nonproprietary information including copies of their application for the personal umbrella coverage and offered to provide them with any other documents they signed or submitted. RP 1295-97; Ex. 10, 16, 19, 24. Falecki never reviewed the documents Universal offered to produce. RP 1295.

Peckenpaugh asked Falecki for any legal authority justifying her request for Universal's documents because it was Universal's opinion that no insurer had an obligation to produce proprietary information. RP 1193; Ex. 16, 19. Despite Peckenpaugh's request, Falecki did not cite to any legal authority in support of her request, as she admitted she was aware of none. Ex. 22.

The parties participated in two mediation sessions. The first mediation session appeared to move toward a settlement based on the

then-known $1.25 million in coverage. RP 464, 466, 734-35.[8] Falecki remained quiet about her belief the Sharbonos had more coverage than the $1 million Universal acknowledged it provided to the Sharbonos. RP 646-47. At the second mediation, Falecki advised Barcus there was a coverage dispute between Universal and the Sharbonos and she broached the subject of an assignment of the Sharbonos' rights against Universal to the Tomyns. RP 363, 464-66, 671, 787-89. Barcus and Falecki discussed Barcus contacting Universal regarding its file. RP 683. It was also at this second mediation, Glenn Reid, Universal's representative, allegedly went out of the room to call Universal's home office and returned to announce the Sharbonos would have to sue Universal to get the underwriting file. RP 343-45, 361-62, 429-30, 668-69, 707-09, 778-79, 1125-27. Reid denies this ever happened. RP 1168.

Armed with the disclosure from Falecki of an insurance coverage dispute, Barcus sent a letter to Peckenpaugh on October 12, 1999 demanding to see Universal's entire underwriting file concerning the All Transmission & Automotive policy. Ex. 25. Barcus indicated he would be compelled to sue the Sharbonos if Universal declined to turn over its

[8] Universal made clear at the first mediation it was prepared to pay its $1 million in limits. RP 1167. Falecki acknowledged the $1 million was offered. RP 737.

file. *Id.* In his letter, Barcus cited to CR 26 regarding the production of coverage information in litigation as the basis for his request. *Id.* Peckenpaugh responded and again asserted the underwriting file contained proprietary information and declined to produce it. RP 1193-94. Coverage counsel for Universal also indicated to Barcus the file would not be produced as there was no authority for such production. Ex. 27.

Thereafter, counsel for the Sharbonos and the Tomyns began to discuss a resolution of their dispute by the assignment of the Sharbonos' rights against Universal to the Tomyns. A strategy meeting took place on October 19, 1999 at which settlement was discussed by counsel for the Sharbonos and the Tomyns. RP 459-60, 686-88; Ex. 160. As a result of that session, a settlement offer was to be transmitted by the Sharbonos' counsel to Barcus, but no such offer followed. RP 461-62; Ex. 161. Finally, on February 8, 2000, Falecki transmitted an offer to Barcus. Ex. 68.

The Tomyns filed a wrongful death action against the Sharbonos on November 10, 1999. CP 483-88; Ex. 80. The Tomyns' lawsuit sought damages but also facilitated the purpose of subpoenaing Universal's records. RP 793-94, 796, 837. Falecki actually assisted Barcus in June or July 2000 in preparing subpoenas for Universal's underwriting file and the pleadings to compel Universal to produce its file. RP 709-14, 745-47.

When the Tomyns attempted to subpoena the underwriting file, Universal moved to quash the subpoena on the ground its files were not discoverable in a suit against its insureds and sought a protective order, but the trial court, the Honorable Sergio Armijo, denied the motion to quash and ordered Universal to produce the file. CP 1425-26, 1438-39, 1700-01.

Universal then sought review by this Court, which granted discretionary review and stayed enforcement of the subpoena. CP 1425-27. In granting review, Commissioner Skerlec stated in her May 3, 2001 ruling that Universal's underwriting materials were "privileged material and work product," Universal had complied with its only obligation under CR 26, and the Tomyns could not use the wrongful death action as a pretext to conduct prelitigation discovery in a future bad faith case against Universal:

> Questions pertaining to insurance are not relevant to the questions of negligence or damages involved in this lawsuit. *See Oppenheimer Fund, Inc. v. Sanders,* 437 U.S. 340, 352 (1978). However, CR 26(b)(2) provides a limited exception to the relevancy requirement . . . The intent of the rule is to protect the insurer's privileged material and work product. Accordingly, discovery is limited to the existence and contents of insurance agreements and any other documents pertinent to coverage that the insurer provided to the insured . . . The documents sought by Tomyn do not fit within the clear language of the exception.

CP 1426-27.

As the motion for discretionary review was being considered by this Court, the Tomyns and Sharbonos negotiated a tentative resolution of the wrongful death suit in October 2000, RP 407, 1115-16; Ex. 92, that was formally executed on March 30, 2001. CP 490-94.[9] Without Universal's prior knowledge or consent,[10] the Sharbonos agreed to confess judgment for $4.525 million, CP 491, to assign their insurance claims to the Tomyns, CP 491-92,[11] in exchange for covenants not to execute (as to

---

[9] In the course of these negotiations, the Sharbonos were as concerned about their own exposure to liability as they were the opportunity to obtain money from Universal. They rejected a settlement offer which compelled them to pay only a small amount of their personal funds, insisting on a share of any judgment against Universal. RP 407-08; Ex. 87-88. This insistence persisted through October of 2000. Ex. 91.

[10] The Sharbonos contended below that Universal "authorized" the settlement. CP 456. This was untrue. CP 640. The letter the Sharbonos cited as the basis for such "authorization" does not support the assertion in any way. CP 502-03.

[11] Paragraph 2 of the agreement stated as follows:

> Assignment of Rights: The defendants assign to plaintiffs all amounts awarded against or obtained from Universal for the following:
>
> > A. The benefits payable under any liability insurance policy in which Defendants have any interest for a covered loss that Universal has breached with respect to clams arising out of the December 11, 1998 motor vehicle accident.
> >
> > B. The benefits payable under any liability insurance policy which, because of an act of bad faith, Universal is estopped to deny or deemed to have sold to Defendants.
> >
> > C. If one or both insurers fail immediately to tender the undisputed liability coverage amounts, any and all causes of action against such insurers resulting from such failure of tender, including claims for the lost use of such monies, bad faith insurance practices, violation of Washington's Consumer Protection Act,

the Sharbonos) and to forebear (as to Cassandra), CP 493;[12] the Sharbonos were required to sue Universal. CP 492.[13] A judgment by confession was signed on March 30, 2001 by Judge Armijo. CP 496-500; Ex. 67.

> misrepresentation, fraud, breach of fiduciary duties, negligence, non-feasance, misfeasance, malfeasance, or other such similar causes of action.
>
> Plaintiffs will apply the proceeds, if any, they obtain by virtue of this assignment towards the judgment referred to in paragraph 1 above, and execute full or partial satisfaction of said judgment as is thereby appropriate.
>
> Except as set forth in paragraphs 2A, 2B, and 2C above, defendants retain unto themselves and do not assign any other rights, claims, causes of action or awards against Universal or any other person or entity, including but not limited to claims or awards for bad faith, violation of Washington's Consumer Protection Act, misrepresentation, fraud, breach of fiduciary duty, negligence, non-feasance, misfeasance, malfeasance, or similar conduct.

CP 491-92. The assignment is not a picture of clarity, but both the Tomyns and the Sharbonos would share the proceeds of any bad faith action.

[12] The covenant to forebear meant that Cassandra was still "on the hook" for any liability. RP 725. Barcus indicated this was designed to compel the Sharbonos to comply in good faith with the terms of the settlement. RP 727, 841. The Sharbonos reasoned their daughter could more readily go through bankruptcy than they could. RP 422-24, 544-46.

[13] Paragraph 3 of the settlement agreement states:

> Suit Against Universal: A. The defendants will, no later than April 30, 2001, initiate suit against Universal asserting such claims as are reasonable and prudent to establish a right to recover the amounts assigned in paragraphs 2A and 2B, and, if necessary, 2C above. Plaintiffs, through their chosen counsel, may participate and assist in the prosecution of those claims as they choose.
>
> B. In such suit, the defendants may assert claims against additional parties – with the exclusion of Plaintiffs, their legal counsel or the appointed Guardian ad Litem – and assert additional claims against Universal as they deem prudent; and, as set forth in paragraph 2 above, Defendants retain unto themselves all right of recovery from such claims.

Having achieved their settlement, the Tomyns and Sharbonos asked this Court to dismiss review as the case was allegedly moot. CP 1429-35.[14] Universal asked the Court to hear the case because it strongly believed this issue would be raised later in a bad faith case. CP 1437-44. This Court, nonetheless, dismissed the case as moot.

Following the settlement, the Sharbonos commenced the present action in the Pierce County Superior Court on May 10, 2001 against Universal and Van de Wege, alleging (1) breach of contract; (2) violation of the Consumer Protection Act (CPA); (3) negligence/negligent misrepresentation; (4) bad faith; (5) breach of quasi-fiduciary duty

---

> C. The claims that give rise to a right to recover amounts assigned in paragraphs 2A and 2B above will be settled only upon agreement by plaintiffs.
>
> D. Each party will pay the attorney fees, costs and expenses they incur in the prosecution of the suit; *provided that* in the event defendants obtain a court award of costs or attorney fees (such as an award under the rule in *Olympic Steamship v. Centennial Ins. Co.,* Washington's Consumer Protection Act, general bad faith law, etc.), the award shall be applied to those costs and attorney fees for which the award is made, with only the balance paid by the party who incurs them; *and provided further that* in the event defendants successfully assert claims that result in plaintiffs recovering under the assignments set forth in paragraphs 2A and 2B above, costs and fees not satisfied by a court award and of costs and fees will be shared by plaintiffs and defendants in the proportion that plaintiffs' recovery on the assigned claims bears to the total damages awarded in the suit.

CP 492-93. The Tomyns obtained a specific right to approve any settlement between the Sharbonos and Universal in paragraph 3C. CP 492.

[14] The position of the Tomyns and the Sharbonos was disingenuous. They knew they were going to sue Universal alleging it engaged in bad faith when it failed to turn over its underwriting file to the Tomyns, as their settlement discussions evidenced.

(Universal); (6) breach of fiduciary duty by Van de Wege; and (7) reformation. CP 1-12. Universal and Van de Wege answered, denying liability. CP 17-25. The case was assigned to the Honorable Rosanne Buckner for trial.

The Sharbonos initially moved for summary judgment, claiming they were entitled to coverage for Cassandra under the $3,000,000 business umbrellas issued to All Transmission & Automotive and the Trans-Plant. CP 315-44.[15] The trial court granted the motion on December 27, 2002. CP 448-49. In a subsequent ruling on January 24, 2003, the trial court found the limits of the commercial umbrella parts of the two policies could be combined, despite antistacking provisions in the Universal policies; the trial court's decision made $6 million in limits available to the Sharbonos beyond the $1 million in personal umbrella coverage Universal conceded was available to them. CP 450-51.

---

[15] The Sharbonos raised this issue of coverage under the business umbrella policies long after the filing of the Tomyns' complaint. The Sharbonos' complaint against Universal never sought coverage under the commercial umbrella of any applicable policy. CP 3-12. Universal believed there was no coverage under the commercial business part and so stated to Maureen Falecki. Ex. 19.

The Sharbonos moved on February 26, 2003 to have their settlement with the Tomyns declared reasonable under RCW 4.22.060. CP 453-625. The trial court so ruled on May 2, 2003. CP 778-79.[16]

Prior to trial, the Sharbonos moved for summary judgment on January 28, 2005 asking the trial court to find Universal engaged in bad faith when it refused to turn over its underwriting file to the Tomyns' attorney and when it allegedly did not explain why it denied coverage under its umbrella policies. They asked the court to find Universal was obligated to pay the confessed judgment. Finally, they sought the stacking of personal and commercial umbrella part limits of the All Transmission & Automotive policy. CP 1642-78. Universal also moved for summary judgment, seeking dismissal of the Sharbonos' claims for negligence/negligent misrepresentation, breach of fiduciary duty, and reformation, and all claims against the Van de Weges as the court's stacking decisions eliminated any claim of underinsurance by Van de Wege. CP 1694-1713. The trial court granted both motions, finding Universal liable for bad faith as a matter of law for failing to turn over its underwriting file and for not paying the Tomyn judgment; the court also

[16] Prior to submitting the case to the jury, the trial court directed a verdict in favor of the Sharbonos on the $4.525 million sum as part of their damages; the court withheld that decision from the jury pending its decision on whether the harm allegedly experienced by the Sharbonos was proximately caused by Universal's bad faith. RP 1751-54.

allowed the stacking of the personal and commercial liability limits, making $7 million in limits available to the Sharbonos. CP 2176. The trial court granted Universal's motion as well, dismissing the Sharbonos' claims for negligence, breach of fiduciary duty, reformation, and any Van de Wege claims. CP 2177.

The Sharbonos proceeded to trial against Universal on their theory Universal was liable for bad faith for failing to produce its internal underwriting file and for forcing them to litigate to obtain access to the file, citing WAC 284-30-330(7) as support for their theory. The trial court initially ruled Universal could not use any part of its underwriting file at trial. RP 115, 124-25, 484-501.[17] The court also ruled Universal could not introduce this Court's May 3, 2001 Commissioner's ruling into evidence to rebut the Sharbonos' arguments on Universal's alleged bad faith in opposing Barcus' subpoena for the internal underwriting records. RP 748-52.

The jury returned a verdict of $4.5 million in favor of the Sharbonos. CP 2307-08. The Sharbonos sought an award of attorney fees and costs on May 5, 2005, CP 2309-20, and moved for an award of treble damages under the CPA. CP 2321-24. The trial court granted the

[17] In the course of the trial, the trial court ruled the Sharbonos opened the door to the admission of the file, RP 1452-63, and permitted its introduction into evidence. Ex. 221.

Sharbonos' motion for attorney fees and costs, and CPA treble damages, for a judgment totaling in excess of $9.6 million. CP 2420-32. The trial court entered a judgment on the jury's verdict on May 20, 2005 in the amount of $9,393,298.63 (which included the Tomyns' settlement of $4.525 million as per its directed verdict) plus $204,090 in attorney fees and costs, and $10,000 in CPA treble damages, for a judgment totaling in excess of $9.6 million. CP 2414-17. Universal moved for remittitur or a new trial, CP 2433-52, which the trial court denied on June 17, 2005. RP 1909-24; CP 2504-05. This timely appeal followed. CP 2458-64. The Sharbonos subsequently filed a notice of cross-appeal. CP 2481-2503.

D. SUMMARY OF ARGUMENT

The Sharbonos' 16-year-old daughter, Cassandra, was involved in a tragic head-on collision, which killed Cynthia Tomyn, the driver of the oncoming car who was a young mother of three children. Cassandra was using a personal vehicle for personal purposes at the time of the accident. She was not using a company vehicle, nor was she using the vehicle for a commercial purpose. State Farm, the Sharbonos' primary automobile liability insurance carrier, paid its liability limits of $250,000 and Universal immediately offered to pay $1 million under the personal umbrella part of the Sharbonos' policy.

The Sharbonos claimed an entitlement to $3 million in personal umbrella coverage, a claim contradicted by contemporaneous documents. Nevertheless, the Sharbonos demanded to see Universal's proprietary underwriting file, which Universal declined to provide.

In the wrongful death action filed by the Tomyn estate and family against the Sharbonos, the Tomyns' counsel demanded Universal's underwriting file, which it declined to provide in its entirety, although Universal provided extensive information on policy coverages and limits. The trial court ordered Universal to provide the entire file, but this Court granted discretionary review of the trial court's decision. Thereafter, the Sharbonos settled the Tomyns' wrongful death case and this Court dismissed review as moot.

The trial court erroneously ruled on summary judgment the Sharbonos had coverage under the *commercial* umbrella liability parts of the Universal policies for two of their transmission businesses for Cassandra's negligent operation of a *personal* vehicle for a *personal* purpose. In light of express antistacking language, the trial court again misread the policies to permit stacking of the coverage limits of the two commercial umbrella liability coverages and the personal umbrella coverage.

Universal did not act in bad faith as a matter of law as any violation of WAC 284-30-330(7) is a question of fact. If anything, Universal was not guilty of bad faith conduct as a matter of law as its withholding of the proprietary parts of its underwriting file was entirely proper. This Court's decision on discretionary review noting the trial court's decision was obvious or probable error, RAP 2.3(b), strongly indicates Universal was not guilty of bad faith as a matter of law in declining access to its underwriting file.

Finally, the trial court submitted the bad faith claim to the jury on erroneous instructions virtually assuring a verdict for the Sharbonos; the trial court neglected to address proximate cause as a vital element of a bad faith action. The trial court's evidentiary rulings made it impossible for Universal to effectively present its defense. Moreover, the court instructed the jury the Sharbonos were entitled to recover emotional distress damages arising from their fear of losing their business without any limitations as to time, despite the fact the Sharbonos' settlement eliminated their financial risk, and without confining the emotional distress to Universal's conduct, as opposed to the Sharbonos' reaction to the Tomyns' plight. The jury obliged with a large verdict against Universal.

The trial court further erred by failing to grant Universal's motion for remittitur or a new trial when, in the absence of any tangible evidence

on emotional distress, the jury awarded the Sharbonos $500,000 each for their alleged emotional distress.

The combination of the trial court's erroneous rulings on summary judgment and its actions at trial virtually assured the Sharbonos a multimillion dollar verdict to which they were not entitled.

E. ARGUMENT

(1) The Trial Court Erred in Its Interpretation of Coverage under the Universal Policy in this Case

(a) General principles of insurance policy interpretation

The interpretation of insurance policies is a question of law. *Kitsap County v. Allstate Ins. Co.,* 136 Wn.2d 567, 575, 964 P.2d 1173 (1998); *Weyerhaeuser Co. v. Aetna Cas. & Sur. Co.,* 123 Wn.2d 891, 897, 874 P.2d 142 (1994).[18] Insurance policies are contracts, and courts seek to determine the intent of the contracting parties. *Eurick v. PEMCO Ins. Co.,* 108 Wn.2d 338, 340-41, 738 P.2d 251 (1987). Courts look to the whole insurance contract in interpreting it, giving the contract a "fair, reasonable, and sensible construction" as understood by the average person purchasing

[18] This Court reviews orders on summary judgment, particularly those involving insurance coverage, *de novo. Daley v. Allstate Ins. Co.,* 135 Wn.2d 777, 782, 958 P.2d 990 (1998).

insurance. *Am. Nat'l Fire Ins. Co. v. B & L Trucking & Constr. Co., Inc.*, 134 Wn.2d 413, 427, 951 P.2d 250 (1998). In effect, courts look to the context of the policy's purchase so that their interpretation of the insurance contract avoids strained or absurd consequences. *Transcon. Ins. Co. v. Wash. Pub. Utils. Dists.' Util. Sys.*, 111 Wn.2d 452, 457, 760 P.2d 337 (1988). The court must look to the plain meaning of the contract to determine coverage. *Kitsap County,* 136 Wn.2d at 576.

In general, courts enforce an insurance contract as written if the contract is clear and unambiguous. *Allstate Ins. Co. v. Peasley,* 131 Wn.2d 420, 424, 932 P.2d 1244 (1997). If there are ambiguities in the policy language, courts may resort to extrinsic evidence to ascertain the intent of parties. *Am. Nat'l Fire Ins. Co.,* 134 Wn.2d at 427-28, 951 P.2d 250. An ambiguity is generally defined as language susceptible to two different reasonable interpretations. *Weyerhaeuser,* 123 Wn.2d at 897. If a court cannot resolve any ambiguities in the policy language by its interpretation, including the resort to extrinsic language, any ambiguities are resolved in favor of the insured. *Id.* A court should not create ambiguities by its policy interpretation, however. *Tyrrell v. Farmers Ins. Co. of Wash.,* 140 Wn.2d 129, 133, 964 P.2d 1173 (1998).

If the provisions of an insurance contract are neither ambiguous nor difficult of comprehension, the intent expressed in the policy will be

enforced regardless of what coverage the insured may have thought he or she had. *Dennis v. Great Am. Ins. Co.,* 8 Wn. App. 71, 74, 503 P.2d 1114 (1972). The preferred interpretation of a policy is that which harmonizes all of its parts and provisions. *See Dobosh v. Rocky Mountain Fire & Cas. Co.,* 43 Wn. App. 467, 471, 717 P.2d 793 (1986). "The fact that a policy is long, and that pertinent language is not contained on a single page does not, in itself, render the policy structurally ambiguous." *State Farm Gen. Ins. Co. v. Emerson,* 102 Wn.2d 477, 484, 687 P.2d 1139 (1984).

In this case, the terms of the Universal policy were not ambiguous. The policy had distinct provisions for the Sharbonos' commercial and personal umbrella coverages, and banned the stacking of limits. The trial court, nevertheless, interpreted the policies in a strained fashion to find coverage for the Sharbonos under the commercial umbrella for the actions of their daughter in driving a personal vehicle for personal purposes. In the face of antistacking provisions, the trial court then stacked the commercial umbrella liability limits of two policies and the limits of the Sharbonos' personal umbrella coverage. This Court should reject such an absurd reading of the Universal policy provisions.

(b) <u>The trial court erred in finding coverage for the Sharbonos under Universal's business umbrella for their daughter's personal use of a family car</u>

Late in the case, the Sharbonos arrived at the idea they had coverage for Cassandra's actions under the commercial umbrella coverages in the All Automotive & Transmission and Trans-Plant policies. None of the letters written by Maureen Falecki to Universal referenced this theory. Ex. 10, 16, 19, 21, 22, 23, 29, 56, 61. Similarly, their complaint is silent on this theory for recovery. CP 3-12.

The trial court nevertheless ruled on summary judgment the Sharbonos were entitled to coverage under commercial umbrella parts of policies issued by Universal for two transmission shops they owned when Cassandra negligently operated her truck, a family vehicle, for personal purposes. CP 448-49. The trial court misinterpreted the commercial umbrella coverage of the Universal policy to afford coverage to the Sharbonos.

The commercial umbrella parts of the two Universal policies provide no coverage for the Sharbonos' personal liability exposures. The only "insured persons" under the commercial umbrella parts are *the businesses themselves*. Although the Sharbonos are also covered while operating business vehicles, their daughter's accident was unrelated to any

business operation. The business insurance is inapplicable to Cassandra Sharbono's operation of the family vehicles for personal purposes.[19]

Universal specializes in insuring automobile dealers and repair facilities; it has developed its own proprietary form of commercial insurance for automobile businesses called the "Unicover" policy. CP 361. The Unicover form is lengthier than many insurance policies, but offers "one-stop shopping," allowing auto industry insureds to select from nearly a dozen business coverages under a single policy. *Id.*[20]

Because the policies contain up to ten different coverages, each having a different purpose, not every policyholder is entitled to every coverage in the policy. Thus, the first paragraph of the All Automotive & Transmission declaration specifies each coverage applies *only* to the insureds listed in the declarations for that coverage part:

> THIS POLICY INSURES ONLY THOSE COVERAGES AND PROPERTY SHOWN IN THE DECLARATIONS

---

[19] James Sharbono testified at trial that insurance was important to his business and he provided accurate information to his insurers. RP 242-48, 574-75. Notwithstanding this assertion, the Sharbonos lied to State Farm about the purpose of the truck they gave to Cassandra that was involved in the Tomyn accident in order to avoid a higher premium; they claimed the vehicle was used for "leisure" purposes rather than for her commute to school. RP 467-70, 576-80; Ex. 20. State Farm cancelled the policy due to the Sharbonos' misrepresentation of Cassandra's status. RP 579-80.

Moreover, Sharbono admitted he never read the Universal policies or their declaration pages. RP 521-24; Ex. 206.

[20] The Sharbonos provided the trial court Universal's annotations to its Unicover policy. CP 396-441. The description there of Universal's umbrella liability coverages is entirely consistent with the description of such coverages in this brief.

MADE A PART OF THIS POLICY. SUCH INSURANCE APPLIES ONLY TO THOSE INSUREDS, SECURITY INTERESTS, AND LOCATIONS DESIGNATED FOR EACH COVERAGE AS IDENTIFIED IN ITEM 2 BY LETTER(S) OR NUMBER.

CP 31.[21] (capitalization in original). Identical language is found in the Trans-Plant policy. CP 171.

The policy's declarations page lists all the persons covered in some fashion by the policy and then specifies the precise coverages and locations for which coverage is afforded. For instance, in the All Transmission & Automotive policy, the following are described as the "Named Insureds":

01 ALL TRANSMISSION & AUTOMOTIVE,
SHAR ENTERPRISES, INC. &
ALL AUTOMOTIVE, INC. D/B/A

02 JAMES & DEBORAH SHARBONO

03 SAR INVESTMENT, INC.

CP 31. The policy specifically references the locations covered. CP 32.

The "Trans-Plant" policy lists the following as "Named Insureds":

01 THE TRANS-PLANT

02 JAMES & DEBORAH SHARBONO

[21] As a reminder to the policyholder, each of the ten coverages within the policy reiterates the quoted provision: coverage applies only "to those insureds . . . designated for each coverage as identified in declarations item 2 by letter(s) or number." *See, e.g.*, CP 60, 66, 77, 83, 113.

CP 171.[22] That policy also lists the location for coverage. CP 172.

The declarations page of each policy also sets forth the limits of coverage. The personal umbrella coverage in the All Transmission & Automotive policy is for limits of $1 million; it covers only persons listed in Item 2 for all injuries, noting the underlying State Farm coverages. CP 41. The commercial umbrella coverage has $3 million limits. CP 42.

The Trans-Plant policy is structured like the All Transmission & Automotive policy; it provides commercial umbrella coverage with $3 million limits and the only difference is that the symbol "01" refers to the Trans-Plant, not All Transmission & Automotive. CP 179. That policy does not provide personal umbrella coverage as such coverage was cancelled, having been transferred to the All Transmission & Automotive policy. CP 179.

Universal draws a distinction between personal umbrella coverage and all other umbrella coverages which offered coverage in excess of underlying business coverages, as Van de Wege explained to the Sharbonos. RP 1439-45. Personal umbrella coverage applies to people and has no connection to any business. RP 1445, 1580, 1582, 1584. The commercial umbrella was specifically designed to be in excess of the

---

[22] The policies also list "Other Insureds" and those with security interests. CP 31, 171.

business liability coverages and separate worker compensation coverages purchased by the Sharbonos for All Transmission & Automotive. RP 1176-78; CP 42, 179. By contrast, the *personal* umbrella coverage specifically referenced the Sharbonos' *personal* underlying auto liability insurance, homeowners coverage, and coverage on the motorhomes maintained with State Farm. CP 41. This chart illustrates this arrangement:

Part Number	Coverage Type	Limits	Insureds	Scheduled Underlying Insurance
970	Personal Umbrella	$1 million	James & Deborah Sharbono (02)	State Farm Homeowners & Automobile
980	Commercial Umbrella	$3 million	All Transmission (01)	Workers Compensation & Commercial Coverages

The commercial umbrella coverage generally defines an insured as follows:

> (a) YOU (and YOUR spouse if YOU are a sole proprietor); if YOU are a sole proprietor, coverage applies only to YOUR business activities as covered by the UNDERLYING INSURANCE;
>
> (b) any of YOUR partners and their spouses, paid employees, directors, executive officers, or stockholders, while acting within the scope of their duties as such;

(c) any other person or organization named in the UNDERLYING INSURANCE (provided to the Named Insured of this Coverage Part) but not for broader coverage than provided to those persons or organizations in the UNDERLYING INSURANCE.

CP 258. This provision again makes clear the pertinent coverage only extended to business entities, their officers, directors, shareholders, or employees acting "within the scope of their duties as such."

However, with respect to auto use, the commercial umbrella coverage extended to "YOU." CP 258. It also applied:

> With respect to (1) any AUTO or watercraft used in YOUR business or (2) personal use of any AUTO owned or hired by YOU:
>
> (a) any person or organization shown in the declarations for this Coverage Part as a "Designated Person."

Id. Thus, "YOU" can be insured one of two ways: as a named insurer under the commercial umbrella or (2) as a "designated person" using a company-related vehicle.

For purposes of this coverage, "YOU" was the business, whether All Transmission & Automotive or Trans-Plant. The businesses were described by symbol "01" in each declarations page. CP 31, 171. The commercial umbrella coverages were limited in each policy to "01" as the insureds. CP 42, 179. The personal umbrella coverage applied to "02," the designation for the Sharbonos. CP 31, 41. The declarations for the

commercial umbrella designate only the businesses ("01") as insureds, while the declarations for the personal umbrella coverage list only the individual household heads ("02") as insureds.

This makes sense for a *commercial* umbrella coverage. The sensible reading of the policy is that the umbrella liability coverage was present for the business, or the officers, directors and other company officials acting in their business capacity, or any other person or entity having coverage under the underlying insurance issued to the business. For auto-related liability, the business had umbrella coverage, as did any vehicle used in the business, or any vehicle owned by the business or hired by the business used by a designated person.

In Washington, umbrella coverage is excess to the insured's primary coverages. *Pub. Util. Dist. No. 1 of Klickitat County v. Int'l Ins. Co.,* 124 Wn.2d 789, 881 P.2d 1020 (1994); *Transcon. Ins. Co. v. Wash. Pub. Utils. Dists.' Util. Sys.,* 111 Wn.2d 452, 760 P.2d 337 (1988). Umbrella policies "pick up where primary coverages end," providing an excess layer of coverage above the limits of the primary policy. *Thompson v. Grange Ins. Ass'n,* 34 Wn. App. 151, 156-57, 660 P.2d 307, *review denied,* 99 Wn.2d 1011 (1983). Given the nature of the underlying coverages to which Universal's personal and commercial umbrellas were excess, the trial court's decision that there was a coverage under a

commercial umbrella for an occurrence involving the Sharbonos' daughter using a *personal* vehicle for *personal* purposes makes little sense.

Washington law clearly indicates an insured may not derive coverage from a commercial liability insurance policy for personal activities. *Hallett v. St. Paul Fire & Marine Ins. Co.,* 50 Wn. App. 567, 749 P.2d 196, *review denied,* 110 Wn.2d 1035 (1988) (law partner who drank to excess and drove a car killing the decedent in a collision not covered under partnership's liability policy); *Alaska Nat'l Ins. Co. v. Bryan,* 125 Wn. App. 24, 104 P.3d 1 (2004), *review denied,* 155 Wn.2d 1007 (2005) (employee of company whose motorcycle passenger was injured on personal trip to Alaska not covered under company's liability policy).

The trial court's decision, however, effectively conflated the personal and commercial umbrella coverages contrary to the very purpose of a *commercial* umbrella liability part; the trial court provided coverage under a *commercial* umbrella part to the Sharbonos' daughter while driving a *personal* vehicle on a *personal* errand with no connection whatsoever to the business. Cassandra's use of the *personal* vehicle for a *personal* purpose is precisely what the personal umbrella liability insurance was designed to address; Universal paid on such coverage.

The Sharbonos' purchase of personal umbrella liability coverage belies any suggestion their daughter's personal activities fell within their business umbrella liability insurance. The two coverages essentially are mutually exclusive; the personal umbrella excludes any "act or omission of the INSURED in any business, profession, or occupational pursuits, or as an officer or member of any board of directors of any corporation or other organization." CP 251. If the Sharbonos thought their repair shops' policies covered personal exposures, they would hardly have paid an additional premium to purchase $1 million separate personal umbrella coverage.

The trial court's determination that a commercial umbrella covered Cassandra Sharbono while operating a personal vehicle for personal, and not commercial, purposes should be rejected. Such an interpretation is a strained interpretation eschewed by Washington courts in interpreting insurance language.[23]

(c) The trial court erred in permitting the Sharbonos to stack umbrella coverage limits

The trial court permitted the Sharbonos to stack the separate $3 million umbrella limits it found to exist in the All Transmission and Trans-

[23] In the commercial setting, between businesses, Washington law recognizes that contracts should be given a commercially reasonable construction. *Wilson Court Ltd. P'ship v. Tony Maroni's, Inc.*, 134 Wn.2d 692, 952 P.2d 590 (1998). The Sharbonos

Plant policies to obtain up to $6 million of total coverage. CP 450-51. Later, it stacked the $1 million of personal umbrella coverage as well, providing $7 million in limits to the Sharbonos. CP 2176. The policy, however, contains a clear *ban* on such stacking of coverages in its general conditions:

> NON-STACKING OF LIMITS – If more than one Coverage Part or policy issued by US to YOU should insure a LOSS, INJURY, OCCURRENCE, claim or SUIT, the most WE will pay is the highest limit applicable. The limit under that Coverage Part or policy will be inclusive of that lower limit in the other Coverage Part(s) or policy(s), not in addition to them.

CP 57, 193. Each umbrella coverage had the following additional provision:

> NON-STACKING OF LIMITS – When an insured has coverage for a LOSS under this Coverage Part and any other Umbrella policy issued by US, the most WE will pay is the percentage the limit under this Coverage Part bears to the total limits of all such policies, but not for more than that percentage of the highest limit of all such policies.

CP 118, 127, 254, 263 (personal and commercial umbrella liability parts). Thus, this antistacking appeared numerous times in the Universal policy.

Washington law on the stacking of coverages largely arose in the context of uninsured motorist (UIM) coverages. Early decisions allowed stacking of UIM coverages. *Federated Am. Ins. Co. v. Raynes,* 88 Wn.2d

---

were sophisticated business people. Their argument advances a commercially unreasonable interpretation of commercial umbrella liability insurance.

439, 563 P.2d 815 (1977); *Cammel v. State Farm Mut. Auto. Ins. Co.,* 86 Wn.2d 264, 543 P.2d 634 (1975).

In response, the 1980 Legislature enacted RCW 48.22.030(5-6) specifically authorizing insurers to forbid stacking, effectively overturning the earlier court decisions. *Millers Cas. Ins. Co., of Texas v. Briggs,* 100 Wn.2d 1, 4, 665 P.2d 891 (1993). RCW 48.22.030(5) bans the internal stacking of coverages, the adding of various coverages within a single policy to increase available limits; RCW 48.22.030(6) allows insurers to ban external stacking, the adding of several different policy coverages to increase available limits. *Britton v. Safeco Ins. Co. of Am.,* 104 Wn.2d 518, 531-32, 707 P.2d 125 (1985). Thus, Washington now expressly allows insurers to prohibit the stacking of coverages, as Universal did.

Washington courts have routinely enforced internal anti-stacking provisions. *See Safeco Corp. v. Kuhlman,* 47 Wn. App. 662, 666, 737 P.2d 274, *review denied,* 108 Wn.2d 1037 (1987); *Doyle v. State Farm Ins. Co.,* 61 Wn. App. 640, 642, 811 P.2d 968, *review denied,* 118 Wn.2d 1005 (1991); *Mut. of Enumclaw Ins. Co. v. Grimstad-Hardy,* 71 Wn. App. 226, 241, 857 P.2d 1064 (1993).

Washington courts have also routinely enforced external stacking limiting clauses. *Greengo v. Pub. Employees Mut. Ins. Co.,* 135 Wn.2d 799, 959 P.2d 657 (1998).

A single Washington case has found antistacking clauses may not be enforced if they are ambiguous. In *State Farm Mut. Auto. Ins. Co. v. Johnson,* 72 Wn. App. 580, 871 P.2d 1066 (1994), the court found the insurer's antistacking clause limiting external stacking of coverages to be ambiguous. The Court of Appeals discerned an ambiguity in the policy's treatment of what constituted other insurance and read the clause in a light most favorable to the insured. It did not invalidate the antistacking clause in its entirety, as did the trial court here.

In *Hawn v. State Farm Mut. Auto. Ins. Co.,* 768 F. Supp. 293 (E.D. Wash. 1991), *aff'd,* 977 F.2d 589 (9th Cir. 1992), the court also found an external antistacking clause to be ambiguous and chose the interpretation most favorable to the insured.

Antistacking clauses do not violate public policy. *Parker v. United Servs. Auto. Assocs.,* 97 Wn. App. 528, 530, 984 P.2d 458 (1999). In *Parker,* this Court evaluated an external antistacking clause and concluded it was not ambiguous. The Court enforced an antistacking clause to bar a child's access to UIM coverage under her divorced mother's UIM coverage.

The antistacking clauses in the Universal policy are enforceable. In *Kuhlman,* the Court of Appeals enforced an antistacking clause similar

to the one present here. In that case, Safeco provided insurance to the Kuhlmans for two vehicles, each with $100,000 UIM limits. A provision in Safeco's policy established the maximum limit as the highest limit applicable to any one vehicle: "If this policy insures two or more autos or if any other auto insurance policy issued by you to us applies to the same accident, the maximum limit of our liability shall not exceed the highest limit applicable to any one auto." *Id.* at 665. The court enforced the antistacking provision.

In the present case, Universal clearly *prohibited* the stacking of coverages. It said so in the policy's general conditions, and reiterated that position in each umbrella coverage. It is difficult to see how the trial court could discern an ambiguity in Universal's position, and thereby *permit* stacking expressly *prohibited* under the policy. Either antistacking provision of the Universal policies bans the stacking of limits the trial court allowed here.

Universal's policies expressed the unambiguous intent to *ban* stacking of coverage limits. The trial court erred in failing not only to carry out such intent but to then *condone* the stacking of personal and commercial umbrella coverages in the two policies.

(2) The Trial Court Erred in Concluding the Tomyns-Sharbonos Settlement Was Reasonable

The trial court entered an order on May 2, 2003 concluding the settlement between the Tomyns and the Sharbonos was reasonable. CP 778-79. It was not. But it was a necessary predicate for the Sharbonos' later motion on bad faith. *See, e.g., Truck Ins. Exch. v. Vanport Homes, Inc.,* 147 Wn.2d 751, 58 P.3d 276 (2002); *Besel v. Viking Ins. Co. of Wisconsin,* 146 Wn.2d 730, 49 P.3d 887 (2002); *Chaussee v. Maryland Cas. Co.,* 60 Wn. App. 504, 803 P.2d 1339 (1991).[24] The settlement in the amount of $4.525 million was far from reasonable.

Although the enactment of several liability in the 1986 Tort Reform Act largely rendered reasonableness hearings unnecessary, they remain significant in a limited area. When an insurer does not settle a claim presented by a claimant against its insured, the insured and the claimant may negotiate a settlement. The insurer may be liable for that settlement if it is reasonable. *Chaussee,* 60 Wn. App. at 509-10. Because of the potential for collusion resulting in inflated settlements where the claimant exonerates the insured from personal liability, the parties must conduct an RCW 4.22.060 reasonableness hearing;[25] the insurer must be

---

[24] The trial court directed a verdict on the $4.525 million Tomyn-Sharbono settlement as an element of damages in the Sharbono bad faith case against Universal. RP 1751-56.

[25] "Because a covenant not to execute raises the specter of collusive or fraudulent settlements, the limitation on an insurer's liability for settlement amounts is all the more important. A carrier is liable only for reasonable settlements that are paid in good faith." *Besel,* 146 Wn.2d at 737-38.

given reasonable notice of the hearing and an actual opportunity to defend its interests. *Red Oaks Condo. Owners Ass'n v. Sundquist Holdings, Inc.*, 128 Wn. App. 317, 116 P.3d 404 (2005); *Howard v. Royal Speciality Underwriting, Inc.*, 121 Wn. App. 372, 89 P.3d 265 (2004).

To determine reasonableness in the context of a covenant not to execute, the *Chaussee* court adopted nine factors from *Glover v. Tacoma General Hospital,* 98 Wn.2d 708, 717, 658 P.2d 1230 (1983): the releasing person's damages; the merits of the releasing person's liability theory; the merits of the released person's defense theory; the released person's relative faults; the risks and expenses of continued litigation; the released person's ability to pay; any evidence of bad faith, collusion, or fraud; the extent of the releasing person's investigation and preparation of the case; and the interests of the parties not being released. *Glover*, 98 Wn.2d at 717. The *Chaussee* court held these factors should be weighed in determining a reasonable settlement, and a court can, in this manner, suitably determine whether a consent judgment is reasonable. *Chaussee*, 60 Wn. App. at 512. No single factor controls, and all factors will not be relevant in each case. *Besel*, 146 Wn.2d at 739 n.2. The Sharbonos bore the burden of proving the settlement reasonable. RCW 4.22.060(1). The trial court's decision on reasonableness is a factual determination,

reviewed under the substantial evidence test. *Brewer v. Fibreboard Corp.*, 127 Wn.2d 512, 524, 901 P.2d 297 (1995).

This case does not involve a situation like that in *Besel* or *Chaussee* where the insurer played hard ball and refused to defend and/or indemnify the insured. The Tomyns received the benefit of the Sharbonos' $250,000 in primary automobile liability insurance limits from State Farm, and Universal made available the additional $1 million under the personal umbrella liability part of the Sharbonos' policy.

The $4.525 million settlement amount was driven more by what insurance coverage the Tomyns and Sharbonos claimed was potentially available than the actual value of the Tomyn claim. In a June 6, 2000 letter, the Tomyns' attorney, Ben Barcus, told the Sharbonos' attorney, Maureen Falecki, the settlement demand was clearly based on the available insurance:

> Entry of a Judgment (see comments below) in the amount of $4,525,000.00: the component parts of which will include:
>
> (a) $250,000.00 from the Sharbono's (sic) State Farm auto liability policy limits;
>
> (b) $4,000,000.00 from the Sharbono's (sic) Universal Underwriters Umbrella coverages;[26]

[26] Barcus' basis for contending $4 million in coverage limits applied is unclear; the Sharbonos argued they purchased $3 million in personal umbrella coverage.

(c) $250,000.00 personal contribution of the Sharbonos; and

(d) $25,000.00 Tomyn UIM coverages previously tendered by State Farm.

CP 655; Ex. 87. As this evidences, the settlement figure was largely dictated by the amount of insurance coverage supposedly sought by the Sharbonos. Moreover, the settlement demand did not deviate a single dollar from the time of that letter until the March 30, 2001 settlement. RP 736.

A careful review of the *Glover/Chaussee* factors indicates the trial court failed to weigh all of the factors in approving the settlement as reasonable. For example, while Ms. Tomyn's estate and her husband and children certainly experienced significant damages, Cassandra Sharbono was not without defenses. Several other vehicles stopped abruptly in front of Cassandra and the car in front of her lost control and veered off the road. CP 659, 669, 676-77. The road was slick because it was raining heavily at the time of the accident. These facts, if established at trial, could prove an emergency situation, which would be a significant defense for Cassandra Sharbono.

The risks and expenses of continued litigation were described by the Sharbonos as "extraordinary." CP 459. Although the Sharbonos

certainly faced the possibility of liability, their exposure was not as great as they portrayed it to be.[27]

First, the Sharbonos faced no risk of further litigation expenses. State Farm accepted coverage under their auto liability policy, and was providing a complete defense without reservation of rights. Ex. 39. Thus, the Sharbonos would not have suffered litigation expense had they not settled.

Moreover, jury verdict research did not support the extremely large settlement agreed to by the Sharbonos. The Sharbonos justified the settlement amount by providing various jury verdicts and settlements, but they emphasized the extreme result in *Joyce v. Dep't of Corrections.* CP 460, 578-80, 710-11, 718-56. For example, Ms. Falecki testified the *Joyce* verdict was a critical factor to the evaluation of the Sharbonos' risk. RP 755-57. But *Joyce* skewed the analysis. The *Joyce* case involved a bizarre situation in which a psychotic felon who was under community

---

[27] In *Werlinger v. Warner,* 126 Wn. App. 342, 109 P.3d 22, *review denied,* 155 Wn.2d 1025 (2005), the Court of Appeals upheld a trial court's determination that a settlement between a plaintiff and an insured for $5 million was unreasonable where the insured had limits of $25,000 and had sought bankruptcy protection from the consequences of the automobile accident. As the Court of Appeals noted:

> the fact that the Warners had been granted a discharge in bankruptcy of their personal liability to Werlinger, made it unreasonable for them to settle for any amount in excess of the available policy limits. By virtue of the bankruptcy discharge, Warner had a complete defense to personal liability.

Id. at 27.

supervision by the Department of Corrections was negligently allowed to violate his conditions of probation. Despite repeated violations, he was given numerous "extra chances" by the Department. Eventually, he stole a vehicle in Seattle and sped down the freeway to Tacoma. He then drove approximately 65-90 m.p.h. through a residential area, ignoring traffic signs and lights, and struck Ms. Joyce's vehicle, killing her. After a trial on negligence and the failure to supervise, the plaintiff recovered a judgment against the Department in the amount of $22.4 million. *Joyce* blatantly skewed the risk the trial court believed the Sharbonos faced.[28] The Supreme Court recently reversed the judgment in that case, *Joyce v. Dep't of Corrections,* 155 Wn.2d 306, 119 P.3d 825 (2005), making all the clearer the fact the trial court misread the extent of the Sharbonos' risk.

The Sharbonos argued they could not afford to pay a personal judgment in the millions, and they would have been forced into bankruptcy if the matter proceeded to trial. In fact, the Sharbonos had considerable personal assets. Ex. 211-12. Although there was a *chance* a verdict in excess of the disputed coverage, they did not have carte blanche to settle for the most coverage they believed they had under the Universal

---

[28] It is noteworthy that the jury verdicts and settlements offered by the Sharbonos in comparable cases, excluding *Joyce*, indicated an average value of $2,036,936.84. CP 636. Additional comparable cases offered by Universal below

policy. The Sharbonos settled for an inflated amount to escape exposure, which is precisely the concern identified by the *Chaussee* court.

Universal did not allege any specific fraudulent activity in the settlement of the Tomyn claims. Nevertheless, it is clear Barcus was well aware from Falecki of both the amount of undisputed coverage (Universal's $1 million) as well as the other $2 million claimed by the Sharbonos. Falecki even assisted Barcus in the preparation of pleadings to force Universal to produce its underwriting file. RP 709-14, 745-47. There was a certain collusive air to the joint efforts of Barcus and Falecki that suggest the settlement value was inflated. This impression is confirmed by the sharing of the settlement proceeds in the settlement agreement, Ex. 81, and Mr. Barcus' prolonged attendance at the Sharbono bad faith trial. RP 285-89, 1762.

Considering all the *Glover/Chaussee* factors, the trial court abused its discretion in approving the Tomyn-Sharbono settlement as reasonable.

(3) The Trial Court Erred in Finding Universal Was Liable as a Matter of Law for Bad Faith

While an insured may have a cause of action under the Consumer Protection Act, RCW 19.86 (CPA), if the insurer breaches its statutory duty to conduct itself in good faith when dealing with an insured, *Salois v.*

---

indicated a number of defense verdicts were rendered by juries. CP 679-707. The average value of Universal's non-defense verdict cases was $1,037,991.97. CP 636-38.

Mutual of Omaha Insurance Co., 90 Wn.2d 355, 359, 581 P.2d 1349 (1978); *Smith v. Safeco Insurance Co.*, 150 Wn.2d 478, 484, 78 P.3d 1274 (2003), this does not convert every coverage dispute between an insurer and an insured into a bad faith claim. Rather, an insured must demonstrate the insurer breached its contract with the insured and such breach was "unreasonable, frivolous, or unfounded." *Overton v. Consol. Ins. Co.*, 145 Wn.2d 417, 433, 38 P.3d 322 (2002). Another way to say this is an insurer acts in bad faith if the insurer does not deal fairly with the insured, giving equal consideration to the insured's interests. *Anderson v. State Farm Mut. Ins. Co.*, 101 Wn. App. 323, 329, 2 P.3d 1029 (2000), *review denied*, 142 Wn.2d 1017 (2001). Whether the insurer's conduct amounted to bad faith is ordinarily a *question of fact*. *Smith*, 150 Wn.2d at 485; *Van Noy v. State Farm Mut. Auto Ins. Co.*, 142 Wn.2d 784, 796, 16 P.3d 574 (2001).

In fact, in cases where bad faith was allegedly present because an insurer violated WAC 284-30-330(7)[29] and required an insured to litigate to recover the full amounts due under a policy, this Court has repeatedly

---

[29] WAC 284-30-330 makes the following an unfair or deceptive act or practice in settlement of claims:

> (7) Compelling insureds to institute or submit to litigation, arbitration, or appraisal to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in such actions or proceedings.

held that proof of a violation of the regulation is a *question of fact*, resting implicitly on the reasonableness of the insurer's conduct in the handling of the claim. *Ins. Co. of the State of Pa. v. Highlands Ins. Co.,* 59 Wn. App. 782, 801 P.2d 284 (1990), *review denied,* 116 Wn.2d 1032 (1991) (insurer's handling of defense costs, though "clumsy," was not unreasonable in violation of WAC 284-30-330(7)); *Keller v. Allstate Ins. Co.,* 81 Wn. App. 624, 915 P.2d 1140 (1996) (insurer's offer of $8000 was not unreasonable although jury awarded $75,200 against insureds); *Am. Mfrs. Mut. Ins. Co. v. Osborn,* 104 Wn. App. 686, 17 P.3d 1229, *review denied,* 144 Wn.2d 1005 (2001) (disparity between amount offered by insurer and appraiser's award not enough to evidence unreasonable conduct by insurer in violation of WAC 284-30-330(7)).

Division I has also found the reasonableness of the insurer's conduct to be an implicit factor in WAC 284-30-330(7). *Anderson,* 101 Wn. App. at 335-36. *Starczewski v. Unigard Ins. Group,* 61 Wn. App. 267, 273, 810 P.2d 58, *review denied,* 117 Wn.2d 1017 (1991).

Washington courts have frequently stated an insurer that merely denies coverage or makes mistakes in investigating coverage or communicating with an insured is not guilty of bad faith. *Rizzuti v. Basin Travel Serv. of Othello, Inc.,* 125 Wn. App. 602, 105 P.3d 1012 (2005). Moreover, bona fide disputes over coverage do not make an insurer guilty

of bad faith. *Transcon. Ins. Co. v. Wash. Pub. Utils. Dists.' Util. Sys.*, 111 Wn.2d 452, 470, 760 P.2d 337 (1988). For example, in *Leingang v. Pierce County Med. Bureau, Inc.*, 131 Wn.2d 133, 155, 930 P.2d 288 (1997), the Supreme Court stated "acts performed in good faith under an arguable interpretation of existing law do not constitute unfair conduct violative of the consumer protection law."

The trial court here articulated two grounds for ruling on bad faith as a matter of law – Universal's refusal to turn over its entire underwriting file to the Sharbonos or to the Tomyns' counsel, and compelling the Sharbonos to litigate to obtain the file in violation of WAC 284-30-330(7). RP 163-64; CP 2174.[30]

However, WAC 284-30-330(7) does not clearly apply here. That regulation pertains to *unreasonable settlement offers*. It does not address an insured seeking disclosure of an insurer's underwriting files. Moreover, *the Sharbonos* did not sue Universal to obtain such files, *the Tomyns* did. The Sharbonos were not actually compelled to litigate with Universal on this issue.

---

[30] The trial court granted Universal's motion for summary judgment that it was not guilty of bad faith as a matter of law in its explanation of its denial of coverage to the Sharbonos and its refusal to pay amounts of disputed coverage at the time of the Tomyn/Sharbono mediations. CP 2176-77.

Assuming WAC 284-30-330(7) applied to Universal's underwriting file at all, Universal did not act unreasonably on this issue. Universal disclosed its $1 million policy limits, provided the Sharbonos with copies of their policy, provided them copies of their personal umbrella applications, voluntarily offered to provide them with any other documents generated, explained to the Sharbonos it believed its remaining underwriting documents were confidential, and offered to reconsider its position if the plaintiffs identified legal authority supporting a different result. Ex. 16, 19. Counsel for the Sharbonos could not provide any legal authority for their position that Universal was obligated to provide its internal files to the Tomyns' counsel. Ex. 22. As this Court noted in *Holly Mountain Resources, Ltd. v. Westport Insurance Corp.,* 130 Wn. App. 635, 104 P.3d 725 (2005), an insurer's offer to consider additional information from the insured is evidence of good faith as a matter of law.

In addition to the foregoing, Universal was *correct* that it had no duty to turn over its proprietary underwriting files to counsel for a party with whom its insured was litigating, as Commissioner Skerlec's ruling on discretionary review only confirmed; the Commissioner determined the trial court's order compelling production of the file was obvious or probable error. RAP 2.3(b)(1-2).

Under the law of bad faith in Washington, an insurer must give equal consideration to its insured's interest, *Anderson, supra,* but this is not to say an insurer is obliged to relinquish its own proprietary interest where that interest is legitimate. Just as it is not bad faith for an insurer to have bona fide disputes with an insured over coverage, it is not bad faith for an insurer to insist in good faith on its right to keep proprietary information proprietary.

This Court's Commissioner agreed with Universal that the Tomyns had no right to access Universal's underwriting file under CR 26(b)(2). That rule, and its federal counterpart, allow discovery of materials calculated to lead to the discovery of admissible evidence and limit discovery to the existence and contents of an insurance policy. *Oppenheimer Fund, Inc. v. Sanders,* 437 U.S. 340, 352, 98 S. Ct. 2380, 57 L.Ed.2d 253 (1978); *Rhone-Poulenc Rorer Inc. v. Home Indemn. Co.,* 139 F.R.D. 609, 613-14 (E.D. Pa. 1991); *Potomac Elec. Power Co. v. California Union Ins. Co.,* 136 F.R.D. 1, 2-3 (D. D.C. 1990).

The trial court's ruling on bad faith as a matter of law snubbed the Commissioner's ruling. As a matter of law, it was not bad faith for Universal to decline to turn over its underwriting file. Its decision not to do so, and to litigate the issue, was reasonable in light of Commissioner Skerlec's decision Universal was not obligated by CR 26(b)(2) to do so.

This exonerates Universal from any liability for bad faith. *Am. Mfrs. Mut. Ins. Co. v. Osborn,* 104 Wn. App. 686, 699-70, 17 P.3d 1229 (2001).

Finally, proximate cause is a necessary element of any Consumer Protection Act claim in Washington, linking the deceptive act and the plaintiff's injury. *Schmidt v. Cornerstone Invests., Inc.,* 115 Wn.2d 148, 167, 795 P.2d 1143 (1990). It is specifically one of the five elements necessary to establish a prima facie bad faith claim under the CPA against an insurer for violation of an Insurance Commissioner regulation. *Indus. Indemnify Co. of the Northwest, Inc. v. Kallevig,* 114 Wn.2d 907, 920-21, 792 P.2d 520 (1990). An insured must prove any harm proximately resulted from the insurer's wrongful conduct. *Coventry Assocs. v. Am. States Ins. Co.,* 136 Wn.2d 269, 276-77, 961 P.2d 933 (1998).

Even if this Court were to find Universal's conduct to be unreasonable and unfounded, it was not the cause of any harm to its insureds. *Anderson*, 101 Wn. App. at 334-35 (bad faith claim requires proof, *not speculation,* that insurer's conduct materially impacted outcome in underlying action against insured); *Osborn,* 104 Wn. App. at 702 (*accord*).

The Sharbonos' liability was caused by the accident that killed Ms. Tomyn. Universal did nothing to increase that liability. The Sharbonos produced no evidence the underlying action would have turned out any

differently had Universal acted differently. Indeed, Clinton Tomyn, the only person who really had a say on the issue, indicated he would not settle for less than $4.525 million; Mr. Tomyn did not deviate one cent from his settlement position from June 6, 2000, Ex. 87, until the Sharbonos confessed judgment. Ex. 67. Whether the Sharbonos or the Tomyns had the Universal underwriting file did *nothing* to alter the outcome. There was a confessed judgment of $4.525 million because the Sharbonos chose to settle and that was the value they put on the case.

The Sharbonos asserted below they "could have used the (underwriting) files to clarify what, exactly, the limits were and used the information in their effort to settle at mediation." CP 1041. This assertion is pure speculation as they failed to submit any evidence showing what records they needed, why they needed them, who wanted to see them, what happened during settlement discussions, what the documents' effect on the Tomyns' claims would have been, or how the case ended any differently because of Universal's conduct. The Sharbonos ultimately obtained Universal's underwriting files, but they never identified a *single specific document* in those files that would have been useful in settling the *Tomyn* action. The Sharbonos failed to prove Universal's conduct was the proximate cause of any harm to them.

The Tomyns were entirely clear that they were seeking $4.525 million in damages from the Sharbonos and had no intention of moving from that position. Maureen Falecki specifically testified the settlement result would have been *no different* if the Universal underwriting file was produced to the Tomyns. RP 703, 757-58. Not even Deborah Sharbono could testify that settlement would have been affected by the disclosure of the Universal file. RP 1676.

This case bears a strong resemblance to *Werlinger v. Clarendon Nat'l Ins. Co.,* 129 Wn. App. 804, 120 P.3d 593 (2005). There, Division I upheld a summary judgment for the insurer in a bad faith case because the insured obtained exoneration from any personal liability by obtaining Chapter 7 bankruptcy protection. The insureds sought bankruptcy protection not because of anything the insurer did, but because of the accident. Here, *nothing* Universal did altered the fact the Sharbonos faced liability to Cynthia Tomyn's estate because of Cassandra Sharbono's conduct. Failure to prove specific harm to the Sharbonos from Universal's denial of the underwriting required the trial court to find no bad faith liability on Universal's part as a matter of law.

At a minimum, the question of Universal's actions under WAC 284-30-330(7) was one of fact, and the trial court erred in granting the Sharbonos' motion that Universal engaged in bad faith as a matter of law.

(4) The Trial Court Erred in Its Handling of the Bad Faith Issue at Trial

The trial court not only erred in submitting the issue of bad faith to the jury at all, but the trial court mishandled the trial on the issue. The trial court made numerous erroneous rulings in the conduct of the trial, all against Universal.[31]

(a) Commissioner's Ruling

The trial court permitted the Sharbonos to introduce the ruling of Judge Sergio Armijo that Universal should have produced its underwriting file to the Tomyns. RP 406, 710-11, 746-48. However, the trial court only permitted the jury to see a part of the picture. It precluded Universal from introducing the ruling of this Court's commissioner granting review. RP 747-50, 923-25.

---

[31] For example, the trial court initially concluded Universal could not use anything in its underwriting file to defend itself against the Sharbonos' bad faith assertions. RP 124, 125. Apparently, this was in the nature of a sanction for Universal's refusal to turn the file over to the Sharbonos. *Id.* Late in the trial, however, the trial court relented and permitted Universal to use the file's contents only after the Sharbonos opened the door to the use of Exhibit 1 from that file when Mrs. Sharbono testified no evidence contradicted her claim she and her husband demanded $3 million in limits from Universal. RP 1136, 1654-56. This Court should clarify that upon remand the contents of the underwriting are admissible.

The court permitted attorney Barcus or his staff to remain in court throughout the proceedings. RP 285-89. This prompted a question from a juror on the reason for Barcus' continued presence. RP 1762. The court also permitted Neil Beaton, the Sharbonos' expert, to remain in court during the testimony of Universal's damages expert, over Universal's objection, RP 1394-95, and then allowed Beaton to testify on rebuttal with documents not previously disclosed to Universal's counsel. RP 1705-08. Similarly, the trial court allowed Deborah Sharbono to offer her VISA bills, documents not previously disclosed, to claim she did not sign Exhibit 1. RP 1685-88.

This Court reviews evidentiary decision of the trial court on an abuse of discretion standard. *Sunbreaker Condo. Ass'n v. Travelers Ins. Co.,* 79 Wn. App. 368, 372, 901 P.2d 1079 (1995), *review denied,* 129 Wn.2d 1020 (1996). However, an evidentiary decision can constitute prejudicial error necessitating a new trial. *See Magana v. Hyundai Motor America,* 123 Wn. App. 306, 94 P.3d 987 (2004) (trial court committed prejudicial error by failing to advise jury certain evidence had been excluded).

Here, the entire thrust of the Sharbonos' bad faith argument was that Universal improperly withheld its underwriting file from the Tomyns' attorney and from the Sharbonos. According to the Sharbonos, this forced them to sue Universal to obtain the file. The Sharbonos offered the Armijo ruling as evidence of Universal's improper withholding of the file. Universal contended it was not guilty of any bad faith because it turned over the portions of the file to which the Sharbonos were entitled. Universal argued it was entitled to withhold the proprietary materials in the file. This Court's RAP 2.3(b) ruling indicated this argument was justified.

A party has a right to present relevant evidence to its position to the trier of fact. ER 402. The trial court's exclusion of the Commissioner's ruling was an abuse of discretion and prejudiced

Universal's ability to fairly present its case to the jury by depriving it of a legal ruling indicating its position on the disclosure of its underwriting file was far from bad faith.

To the extent the Armijo ruling was relevant to any issues at trial, the decision of Commissioner Skerlec on discretionary review was equally relevant. The Sharbonos should not have been allowed to place Universal in a bad light as an insurer resisting its insureds' efforts to secure information without disclosing to the jury a court ruling indicating such resistance was justified.

(b) Improper Disclosure of Evidence from Two Mediations

Over the objection of Universal's trial counsel, the trial court permitted James Sharbono, Maureen Falecki, Ben Barcus, and Deborah Sharbono to testify as to what transpired at the two mediations, including Mr. Barcus' playing of a videotape on the effect of Ms. Tomyn's death on her family. RP 343-45, 361-61, 429-30, 667-69, 707-09, 778-79, 1125-27. The testimony regarding the videotape and its impact on the Sharbonos was irrelevant, but clearly designed to elicit jury sympathy.

James Sharbono and Falecki were allowed to testify Glenn Reid, the Universal representative at the mediations, allegedly left the room to consult with his superiors about the underwriting file, and returned to

announce the Sharbonos would have to sue Universal to obtain the file. RP 361-62, 429-30, 668-69. Reid was compelled to testify that the incident never occurred. RP 1168. This testimony was plainly prejudicial to Universal, as a juror asked about the alleged phone call, which Reid again denied. RP 1172.

RCW 5.60.070(1) provides confidentiality as to all mediation proceedings, stating:

> If there is a court order to mediate, a written agreement between the parties to mediate, or if mediation is mandated under RCW 7.70.100, then any communication made or materials submitted in, or in connection with, the mediation proceeding, whether made or submitted to or by the mediator, a mediation organization, a party, or any person present, are privileged and confidential and are not subject to disclosure in any judicial or administrative proceeding. . . .

See also RCW 7.07.030 (effective January 1, 2006). None of the statutory exceptions to RCW 5.60.070(1) applies here. The statute has its counterpart in ER 408, which makes evidence "of conduct or statements made in compromise negotiations" inadmissible.

In this case, the trial court violated the confidentiality of mediation guaranteed by RCW 5.60.070 and ER 408 in admitting evidence of what transpired at the mediation proceedings, evidence that was designed to raise a sidelight issue and to try to place Universal in the most negative possible light.

(c) Nondisclosed Expert Witnesses

The trial court here permitted Maureen Falecki, the Sharbonos' initial counsel from the Burgess Fitzer firm, Ben Barcus, the Tomyns' trial counsel, and David Bufalini, the guardian ad litem for Nathan Tomyn, to render opinions regarding Universal's conduct or coverage. *See, e.g.,* RP 634-39, 643-44, 660, 780-81, 870, 879-80. None of these individuals was disclosed as an expert by the Sharbonos. This decision was plainly prejudicial. In Falecki's case, she testified in her deposition that she would not be rendering such opinions and would only be a fact witness. RP 634. Falecki's testimony on the effect of the underwriting file on the Tomyn-Sharbono settlement was highly speculative, contradicting her own testimony that the result would have been no different. RP 703, 757-58.

Neither Falecki nor Barcus, of course, was a disinterested "expert witness." Falecki represented the Sharbonos. Barcus and his clients stood to benefit financially from any recovery by the Sharbonos against Universal as an aspect of their settlement agreement. RP 871-72; CP 491-92.

The trial court also allowed the Sharbonos to use Barcus' testimony on a highly selective basis. Barcus testified "in general terms" how an underwriting file might be of use to a plaintiff's attorney. RP 780-

84. He was asked to explain terms at issue in the case. RP 922. Universal objected to Barcus' testimony as an undisclosed expert, RP 780-81, but the trial court permitted him to testify. *Id.* However, the trial court barred Universal from cross-examining Barcus on how the Universal underwriting file would have aided in the Tomyns' case against the Sharbonos because Barcus could invoke work product to forestall testimony in the use of the file in this case. *See, e.g.,* RP 872-73. Again, the issue of proximate cause remained a live issue for the jury. How the absence of the underwriting file specifically affected the Tomyn-Sharbono settlement was entirely relevant to proximate cause.

By restricting Universal from cross-examining Barcus on the file's use, the trial court again tied Universal's hands and prevented the jury from hearing the full presentation of Universal's theory of the case. The trial court's action was prejudicial error.

(d) Instruction on Court's Prior Coverage Rulings

The trial court erred in giving Instruction Number 5 to the jury. CP 2272.[32] The trial court's decision to give Instruction Number 5 to the jury was prejudicial error because the instruction needlessly focused on

[32] Instructions to the jury must be a correct statement of the law. They are reviewed de novo. *Hue v. Farmboy Spray Co., Inc.,* 127 Wn.2d 67, 92, 896 P.2d 682 (1995); *Joyce v. Dep't of Corrections,* 155 Wn.2d 306, 323, 119 P.3d 825 (2005). Erroneous statements of the law in a jury instruction are presumed to be prejudicial error. *Magana,* 123 Wn. App. at 316-17.

the court's rulings, was not germane to the questions posed to the jury in the special verdict form, and failed to properly account for the issue of proximate cause. In effect, the trial court directed the jury to render a verdict for the plaintiffs.

Instruction Number 5 recited at least three earlier rulings the trial court made in the case. *None* was relevant to the bad faith issue before the jury. This recitation loaded the case against Universal, prejudicing the jury.

The last paragraph of the instruction is entirely misleading. It states affirmatively that Universal acted in bad faith and violated the Consumer Protection Act. The court's instruction nowhere mentions that proximate cause remained for the jury to decide or references the court's proximate cause instruction. The instruction was at odds with the court's later Instruction Number 12 on proximate cause. CP 2279.

By stating bad faith was present as a matter of law, the court effectively instructed the jury liability was established. Instruction Number 5 was an erroneous statement of the law, and it was confusing for the jury. The trial court committed prejudicial error in giving Instruction Number 5 to the jury. The prejudicial impact of this instruction is made ever the clearer by the fact the Sharbonos' counsel vigorously argued it to the jury. RP 1787-89.

(e) Court's Instruction on Proximate Cause

The trial court instructed the jury on proximate cause in a bad faith case in Instruction Number 12:

> The term "proximate cause" means a cause that was a substantial factor in bringing about the damages or injury even if the result would have occurred without it.

CP 2279. Universal objected to this instruction, and the failure to give its more traditional instruction on proximate cause based on WPI 310.07. RP 1769-71; CP 2228.[33]

The trial court used the wrong instruction on proximate cause for this case. The substantial factor approach to proximate cause has been used sparingly in Washington case law. The concept arose in *Herskovits v. Group Health Coop. of Puget Sound,* 99 Wn.2d 609, 664 P.2d 474 (1983), a medical malpractice case, where the doctor misdiagnosed a patient's cancer, depriving the patient of the chance to survive a potentially fatal illness or reducing the chance to survive. A lead opinion of two justices applied the substantial factor test while a concurring opinion of four justices applied the standard "but for" test. The Court ultimately believed that loss of chance to survive was recoverable. The Supreme Court, however, rejected the substantial factor formulation of

[33] Universal's instruction defined proximate cause as "a cause which in direct sequence unbroken by any new independent cause produces the injury complained of and without which such injury would not have happened." CP 2228.

proximate cause in legal malpractice cases in *Daugert v. Pappas,* 104 Wn.2d 254, 704 P.2d 600 (1985). *See also Nielson v. Eisenhower & Carlson,* 100 Wn. App. 584, 999 P.2d 42, *review denied,* 141 Wn.2d 1016 (2000).

Causation in a CPA case is better addressed by the traditional formulation of proximate cause. *See* 6A *Washington Practice* at 274-75; *Blasick v. City of Yakima,* 45 Wn.2d 309, 274 P.2d 122 (1954) (generally rejecting substantial factor formulation).

The net effect of the trial court's proximate cause instruction was to relieve the Sharbonos from having to prove a vital element of their bad faith claim under the CPA. The Sharbonos bore the burden of proving Universal's failure to produce its underwriting file proximately resulted in harm to them. They could not, and did not, do this. They produced *no testimony* that the possession of that file would have resulted in a settlement on more favorable terms to their position or in an earlier settlement of the case. The substantial factor instruction allowed the jury to speculate that a better settlement *might* have been possible, but that was not enough to sustain the verdict here.

Any one of the trial court's decisions outlined *supra*, constituted prejudicial error requiring reversal of the trial court's bad faith judgment.

(5) The Jury's Damage Award for the Sharbonos' Alleged Emotional Distress Was Excessive

The jury's award of $4.5 million for bad faith was excessive. The jury awarded $1.75 for past economic loss, $1.75 for future economic loss to the Sharbonos,[34] and $500,000 each to the Sharbonos for their alleged emotional distress arising out of their fears for their personal financial security occasioned by Universal's refusal to defend or indemnify them from the Tomyn claim. CP 2307-08.[35] This award is clearly excessive given the Sharbonos' settlement with the Tomyns that *fully protected them from any personal liability on the Tomyn claim.*

Universal moved below for remittitur or a new trial, CP 2433-52, which the trial court denied. CP 2504-05. A party may seek a reduction in the amount of damages awarded by a jury if the verdict was unmistakenably the product of passion or prejudice. RCW 4.76.030; CR 59(a). The trial court has discretion with respect to such a motion. *Wooldridge v. Woolett,* 96 Wn.2d 659, 668, 638 P.2d 566 (1981). The court may reduce a jury's damages with the plaintiff's consent as an

---

[34] The Sharbonos' economic expert Neil Beaton made a $1 million error in the calculation of economic loss he corrected only after reviewing the report of Universal's expert. RP 968-69, 1015-16, 1022.

[35] The jury awarded James and Deborah more money for their alleged emotional distress than the three Tomyn children received for the death of their mother. The guardians ad litem for Nathan, Aaron, and Christian Tomyn approved payments of $110,000 each to the three Tomyn children. CP 505-28, 762-77.

alternative to a new trial. *Green v. McAllister,* 103 Wn. App. 452, 462, 14 P.3d 795 (2000).

A new trial should be granted if an award of damages is excessive. CR 59(a)(5). An award of damages is excessive if the damages "unmistakenably indicate that the award was the result of passion and prejudice." *James v. Robeck,* 79 Wn.2d 864, 868, 490 P.2d 878 (1971); *Nord v. Shoreline Savs. Ass'n,* 116 Wn.2d 477, 486, 805 P.2d 800 (1991). The amount of damages must be "so excessive as to be outside the range of evidence or so great as to shock the court's mistake." *Rasor v. Retail Credit Co.,* 87 Wn.2d 516, 531, 554 P.2d 1041 (1976).

In *Himango v. Prime Time Broad., Inc.,* 37 Wn. App. 259, 680 P.2d 432, *review denied,* 102 Wn.2d 1004 (1984), the court upheld a trial court's reduction of damages awarded in a defamation action from $250,000 to $70,000. The plaintiff, a police officer, sued a television station for broadcasting an allegedly defamatory statement that the officer was seen in a "compromising position" with a woman who was not his wife. *Id.* at 261. The trial court carefully laid out its reasons for reducing the verdict, stating that he found the damages to be "greatly excessive," and essentially "an unlawful attempt to award punitive damages." *Id.* In upholding the trial court's reduction of the damages award, the court specifically noted Himango was unaffected professionally, "did not claim

mental or physical distress other than a general feeling of outrage at the broadcast," that his friends and his wife stood by him and that "[n]o other witnesses testified as to damages." *Id.* at 268.

In a bad faith case, an insured may recover emotional distress damages. *Coventry,* 136 Wn.2d at 284-85; *Smith,* 101 Wn. App. at 333. To recover general damages for emotional distress, as here, the Sharbonos bore the burden of demonstrating the "mental suffering, inconvenience, and mental anguish" they sustained. CP 2280.

The essence of the Sharbonos' contention was that as a result of having to sue Universal to obtain its underwriting file, they experienced emotional distress because the resolution of the Tomyn claim was needlessly prolonged. However, the trial court was not careful in limiting the Sharbonos' alleged emotional distress to that associated with the prolongation of the settlement process.[36] The trial court repeatedly allowed the jury to hear testimony pertaining to the Sharbonos' alleged distress arising out of the death of Cynthia Tomyn. *See, e.g.,* RP 708-09,

---

[36] Similarly, the trial court was not careful to limit the duration of the Sharbonos' alleged emotional distress. The trial court's Instruction Number 13 on the Sharbonos' ability to recover emotional distress damages did not limit their ability to recover such damages to distress associated only with Universal's conduct, nor did the instruction confine such damages to the period up to the final settlement agreement which exonerated the Sharbonos from any personal liability (October 2000). RP 407, 1115-16; Ex. 92. Instead, the trial court allowed the Sharbonos to testify to distress from any cause. Both Sharbonos testified the settlement released them from the stress they allegedly felt. RP 446, 1116-17.

778-89, 1125-26, 1128, 1734-36.[37] This distress had *nothing* to do with Universal's underwriting file or Universal at all. *See Werlinger,* 129 Wn. App. at 596 (no recovery for emotional distress by insured as to accident, only for the insurer's bad faith).

In this case, the Sharbonos offered scant testimony on their alleged emotional distress; they claimed they were "upset" by Universal's actions. RP 1127-28. They testified they did not feel like going to work. RP 1127, 1695-97. There was no evidence the Sharbonos sought counseling, manifested any physical discomfort or illness caused by their alleged emotional distress, or were in any other way affected by Universal's conduct. RP 560. There was no evidence of pain or suffering. There was no evidence of severe or long-lasting trauma or emotional disturbance. There was no evidence of any serious impact on relationships with family members or loss of enjoyment of life other than the kind of stress that any person would go through while pursuing litigation of this magnitude. No other witness testified to the Sharbonos' emotional damage.

The Sharbonos' major contention is that they feared, and experienced emotional distress from, the declining fortunes of their

---

[37] The Sharbonos actually sought to play the videotape of the impact of Cynthia Tomyn's loss to the family before the jury in this case. RP 292-95.

businesses and the spectre of bankruptcy from the Tomyn case. Their contentions are belied by several key points. First, Cassandra Sharbono testified her father was largely retired prior to the accident. RP 1421-22. Second, the Sharbonos' settlement with the Tomyns *exonerated* them from any further liability effectively as of October, 2000 and formally after March 30, 2001. CP 490-94, 548-51. In fact, in the course of settlement negotiations, attorney Barcus offered to limit the Sharbonos' personal financial exposure to $300,000, of which $50,000 could be reimbursed from any recovery from Universal. Ex. 87. This was hardly a "disabling" exposure for persons of the Sharbonos' extensive wealth. Third, the Sharbonos' financial fortunes did not ebb, but rather were on the rise; they had a 1997 net worth of $1.473 million and a 2003 net worth of $2.24 million. Ex. 211-12. In fact, the Sharbonos purchased a $160,000 motorhome, a jet ski, and expensive motorcycles while they claimed to have experienced emotional distress from the lawsuit. RP 509-12, 1118-24. These personal expenses contributed to the Sharbonos' financial bind, as their own expert and James Sharbono conceded. RP 1065-66, 1701-02. Moreover, they did nothing to gather assets sufficient to satisfy a judgment. RP 558-59.

Finally, the Sharbonos aggressively negotiated a settlement with the Tomyns to give themselves a share of any recovery. They wanted a

share of any insurance coverage *and* bad faith recovery from Universal. RP 415-16; Ex. 88. The final settlement they signed exonerated them from any liability, but left their daughter Cassandra liable if the recovery from Universal was insufficient. RP 422, 543-45; Ex. 81. James Sharbono reasoned his daughter could more easily avail herself of bankruptcy. RP 422-24, 544-46. This approach, however, dashed Cassandra Sharbono's hopes of being a veterinarian. RP 545-47. Such conduct belies any Sharbono contention of emotional distress caused by Universal.

The jury verdict of $500,000 each to James and Deborah Sharbono for their emotional distress was so excessive as to evidence the fact the jury acted with passion and prejudice.

F. CONCLUSION

The trial court erred in its determination the Sharbonos had coverage under the *commercial* umbrella parts of Universal's policies for their daughter's negligent operation of a personal vehicle for personal purposes. The Sharbonos only had coverage under the *personal* umbrella part of their Universal policy.

The trial court compounded that error by allowing the Sharbonos to stack the various personal and commercial umbrella coverage limits, despite express antistacking clauses in the Universal policy.

The trial court further compounded its error by finding bad faith on Universal's part as a matter of law and conducting a trial that made a substantial verdict for the Sharbonos inevitable. Although Universal stepped up to pay the $1 million it was obligated to pay the Sharbonos, the trial court's rulings resulted in a judgment of more than $9.6 million.

The Court should reverse the trial court's decisions on coverage and hold Universal's liability was confined to $1 million under the Sharbonos' personal umbrella coverage. The Court should find Universal acted reasonably as a matter of law in asserting its proprietary interest in its underwriting file. The issue of Len Van De Wege's alleged negligence in providing appropriate coverage should be remanded to the trial court for further proceedings. The trial court's judgment on the Sharbonos' bad faith claim should be vacated. Costs on appeal should be awarded to appellant Universal.

DATED this 6th day of March, 2006.

Respectfully submitted,

Philip A. Talmadge

Philip A. Talmadge, WSBA #6973
Talmadge Law Group PLLC
18010 Southcenter Parkway
Tukwila, WA 98188-4630
(206) 574-6661

Dan'L W. Bridges, WSBA #24179
Law Offices of Dan'L W. Bridges
11100 Northeast 8th Street, #300
Bellevue, WA 98004-2912
(425) 818-4880
Attorneys for Appellant/
Cross-Respondent
Universal Underwriters Insurance Company

APPENDIX

WAC 284-30-330
Wash. Admin. Code 284-30-330

WASHINGTON ADMINISTRATIVE CODE
TITLE 284. INSURANCE COMMISSIONER, OFFICE OF
CHAPTER 284-30. TRADE PRACTICES
UNFAIR CLAIMS SETTLEMENT PRACTICES

Current with amendments adopted through January 4, 2006

284-30-330. Specific unfair claims settlement practices defined.

The following are hereby defined as unfair methods of competition and unfair or deceptive acts or practices in the business of insurance, specifically applicable to the settlement of claims:

(1) Misrepresenting pertinent facts or insurance policy provisions.

(2) Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies.

(3) Failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies.

(4) Refusing to pay claims without conducting a reasonable investigation.

(5) Failing to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed.

(6) Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear. In particular, this includes an obligation to effectuate prompt payment of property damage claims to innocent third parties in clear liability situations. If two or more insurers are involved, they should arrange to make such payment, leaving to themselves the burden of apportioning it.

(7) Compelling insureds to institute or submit to litigation, arbitration, or appraisal to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in such actions or proceedings.

(8) Attempting to settle a claim for less than the amount to which a reasonable man would have believed he was entitled by reference to written or printed advertising material accompanying or made part of an application.

(9) Making claims payments to insureds or beneficiaries not accompanied by a statement setting forth the coverage under which the payments are being made.

(10) Asserting to insureds or claimants a policy of appealing from arbitration awards in favor of insureds or claimants for the purpose of compelling them to accept settlements or compromises less than the amount awarded in arbitration.

(11) Delaying the investigation or payment of claims by requiring an insured, claimant, or the physician of either to submit a preliminary claim report and then requiring subsequent submissions which contain substantially the

same information.

(12) Failing to promptly settle claims, where liability has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage.

(13) Failing to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement.

(14) Unfairly discriminating against claimants because they are represented by a public adjuster.

(15) Failure to expeditiously honor drafts given in settlement of claims. A failure to honor a draft within three working days of notice of receipt by the payor bank will constitute a violation of this provision. Dishonor of any such draft for valid reasons related to the settlement of the claim will not constitute a violation of this provision.

(16) Failure to adopt and implement reasonable standards for the processing and payment of claims once the obligation to pay has been established. Except as to those instances where the time for payment is governed by statute or rule or is set forth in an applicable contract, procedures which are not designed to deliver a check or draft to the payee in payment of a settled claim within fifteen business days after receipt by the insurer or its attorney of properly executed releases or other settlement documents are not acceptable. Where the insurer is obligated to furnish an appropriate release or settlement document to an insured or claimant, it shall do so within twenty working days after a settlement has been reached.

(17) Delaying appraisals or adding to their cost under insurance policy appraisal provisions through the use of appraisers from outside of the loss area. The use of appraisers from outside the loss area is appropriate only where the unique nature of the loss or a lack of competent local appraisers make the use of out-of-area appraisers necessary.

(18) Failing to make a good faith effort to settle a claim before exercising a contract right to an appraisal.

(19) Negotiating or settling a claim directly with any claimant known to be represented by an attorney without the attorney's knowledge and consent. This does not prohibit routine inquiries to an insured claimant to identify the claimant or to obtain details concerning the claim.

Statutory Authority: RCW 48.02.060, 48.44.050 and 48.46.200. 87-09- 071 (Order R 87-5), S 284-30-330, filed 4/21/87. Statutory Authority: RCW 48.02.060 and 48.30.010. 78-08-082 (Order R 78-3), S 284-30-330, filed 7/27/78, effective 9/1/78.

<General Materials (GM) - References, Annotations, or Tables>

WA ADC 284-30-330
END OF DOCUMENT

INSTRUCTION NUMBER 5 TO THE JURY:

In prior proceedings in this case, the court made the following rulings.

First, based on documents in the plaintiffs' possession, the court ruled that the insurance policies Universal Underwriters issued on the Sharbonos' businesses provided up to $6 million dollars more than the $1 million dollars in insurance Universal said it owed for the accident under the Sharbonos' personal umbrella policy. This is not an issue of bad faith.

Second, the court ruled that the settlement the Sharbonos entered into with the Tomyns was fair and reasonable to compensate the Tomyns for their loss.

Third, the court ruled that since $7 million of insurance is sufficient to pay the remainder of the settlement, it is not necessary for you to decide whether Universal was negligent in failing to add additional personal umbrella insurance to the Sharbonos' policies.

In prior proceedings, the court has also ruled that Universal acted in bad faith and violated Washington's Consumer Protection Act when it refused to provide the information the Sharbonos asked for to help them determine if Universal was wrong in not adding personal umbrella insurance to their policies, and when it compelled the Sharbonos to institute litigation in order to get that information. Unlike the court's other

prior rulings, you are instructed that you should consider these rulings when rendering your verdict.

CP 2272.

INSTRUCTION NUMBER 12 TO THE JURY:

The term "proximate cause" means a cause that was a substantial factor in bringing about the damages or injury even if the result would have occurred without it.

CP 2279.

INSTRUCTION NUMBER 13 TO THE JURY:

It is the duty of the court to instruct you as to the measure of damages. By instructing you on damages the court does not mean to suggest for which party your verdict should be rendered.

If your verdict is for the plaintiffs, then you must first determine the amount of money required to reasonably and fairly compensate the plaintiffs for the total amount of damages.

You should consider the following economic damages elements:

1. The reasonable value of earnings, earning capacity, salaries, business opportunities, and earning opportunities lost to the present time;

2. The reasonable value of earnings, earning capacity, salaries, business opportunities, and earning opportunities with reasonable probability to be lost in the future;

1. The mental suffering, inconvenience, and mental anguish incurred by the injured party and with reasonable probability to be experienced in the future.

The burden of proving damages rests upon the plaintiffs. It is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence.

Your award must be based upon evidence and not upon speculation, guess, or conjecture.

The law has not furnished us with any fixed standards by which to measure noneconomic damages. With reference to these matters you must be governed by your own judgment, by the evidence in this case, and by these instructions.

CP 2280.

DEFENDANT'S PROPOSED INSTRUCTION N:

Plaintiff has the burden of proving that the defendant's act or practice was a proximate cause of the plaintiff's injury.

"Proximate cause" means a cause which in direct sequence unbroken by any new independent cause produces the injury complained of and without which such injury would not have happened.

There may be one or more proximate causes of an injury.

CP 2228.

3/7/01

68807-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

PAO
MLC
FV

DIVISION II

CLINTON L. TOMYN, individually and as personal representative of the ESTATE OF CYNTHIA L. TOMYN, deceased, and as parent/guardian of NATHAN TOMYN; AARON TOMYN; and CHRISTIAN TOMYN, minor children, Respondent, v. CASSANDRA SHARBONO, individually; JAMES and DEBORAH SHARBONO, individually and the marital community composed thereof, Respondents.	No. 26487-1-II RULING GRANTING REVIEW

Petitioner Universal Underwriters seeks review of Pierce County Superior Court orders denying its motion to quash Clinton Tomyn's subpoena duces tecum and requiring Universal's compliance with the subpoena. Universal contends its business records are not relevant until or unless there is a bad faith lawsuit. This is a wrongful death action based upon allegations that Cassandra Sharbono was negligent in the operation of her motor vehicle, causing the collision in which Cynthia Tomyn died. Universal proffered the $1,000,000 available under the Sharbonos' insurance policy.[1] However, during settlement negotiations, the Sharbonos asserted that they had asked their agent to procure coverage

[1] This was personal liability umbrella coverage included in a policy for one of the Sharbonos' automotive businesses.

under three separate policies, totaling $3,000,000. This revelation prompted the subpoena, which requires production of:

> All underwriting files, the complete agent file, the complete account executive file, any files or documents maintained or created by [agent] Len Van de Wege, for [eight different individuals or businesses].
>
> Each and every document, including, but not limited to, each and every writing, report, letter, memorandum, computer generated information, and document of any type included in the above-listed files, as well as the file jacket(s) or folder(s)[,] any informal notes, any file log(s) of underwriter or agent or account executive or insurer employee activity, of any nature or kind whatever, wherever located . . . . including but not limited to proposals, applications, change orders or requests, premium calculations, engineering or inspection reports, communications or notes of communications between or among and by or from insureds, insurer employees, agents, account executives, or representatives of any kind . . . .

Under CR 26(b)(1), "[p]arties may obtain discovery regarding any matter, not privileged which is relevant to the subject matter involved in the pending action." Tomyn argued below that the information sought would facilitate settlement, in that it would enable him to determine whether or not there was a possibility of more money from Universal. Such additional money would be acquired only through a claim against Universal. Tomyn cannot use discovery in one lawsuit to obtain evidence that is only relevant in a second lawsuit. *See First State Ins. Co. v. Kemper Nat'l Ins. Co.*, 94 Wn. App. 602, 614-15, *review denied*, 138 Wn.2d 1009 (1999). Questions pertaining to insurance are not relevant to the questions of negligence or damages involved in this lawsuit. *See Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 352 (1978). However, CR 26(b)(2) provides a limited exception to the relevancy requirement:

> A party may obtain discovery and production of: (i) the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments

> made to satisfy the judgment; and (ii) any documents affecting coverage (such as denying coverage, extending coverage, or reserving rights) *from or on behalf of such person to the covered person or the covered person's representative*

(Emphasis added). The intent of the rule is to protect the insurer's privileged material and work product. Accordingly, discovery is limited to the existence and contents of insurance agreements and any other document pertinent to coverage that the insurer provided to the insured. ORLAND AND TEGLAND, WASHINGTON PRACTICE, VOL. 4, AUTHOR'S COMMENTS, 2000 pocket part, p. 6. The documents sought by Tomyn do not fit within the clear language of the exception. Neither the parties, nor the superior court provided any authority for departure from the rule, and this court has found none. Interlocutory review is appropriate. RAP 2.3(b)(2). Accordingly it is hereby

ORDERED that review is granted. Enforcement of the superior court's order requiring compliance with the subpoena duces tecum is stayed pending resolution of this matter.

DATED this 3rd day of May, 2001.

Court Commissioner

cc: Pamela S. Okano
Ruth Nielsen
Paul Lindenmuth
Benjamin Franklin Barcus
Timothy R. Gosselin
Christopher Daniel Anderson
Dennis J. LaPorte
Hon. Sergio Armijo
Pierce County Superior Court
Cause number: 99-2-12800-7

THE FOLLOWING DOCUMENTS ARE DUE:
Designation of Clerk's Papers 5/18/01
Statement of Arrangements 6/18/01

The Honorable Rosanne Buckner
TRIAL DATE: MARCH 28, 2005

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

JAMES and DEBORAH SHARBONO, individually and the marital community composed thereof; CASSANDRA SHARBONO,

Plaintiffs,

vs.

UNIVERSAL UNDERWRITERS INSURANCE COMPANY, a foreign insurer; LEN VAN DE WEGE and "JANE DOE" VAN DE WEGE, husband and wife and the marital community composed thereof,

Defendants.

NO. 01 2 07954 4

JUDGMENT

I. JUDGMENT SUMMARY

1. Judgment Creditors:	James Sharbono, Deborah Sharbono and Cassandra Sharbono (currently known as Cassandra Barney)
2. Attorney for Judgment Creditor:	Timothy R. Gosselin, Burgess Fitzer, P.S., 1501 Market Street, Suite 300, Tacoma, Washington 98402
3. Judgment Debtor:	Universal Underwriters Insurance Company
4. Principle Judgment Amount:	$9,393,298.63, plus interest accruing on the unpaid portion of the Judgment by Confession entered in the matter of Tomyn v. Sharbono, Pierce County Cause No. 99-2-12800-7 pursuant to the terms of said judgment.

BURGESS FITZER, P.S.
ATTORNEYS AT LAW
1501 MARKET STREET, SUITE 300
TACOMA, WASHINGTON 98402-3333
(253) 572-5324 FAX (253) 627-8928

5. **Attorney Fees and Costs:** $ 204,090.00 KK

6. **Other Recovery Amounts:** $ 10,000.00 KK

7. **Post- Judgment Interest:** Post-judgment interest shall accrue on $4,893,298.63 of the principle judgment amount, and on such additional amounts as become due and owing under paragraph 1 below, at the rate of 12% per annum. Post-judgment interest shall accrue on $4,500,000.00 of the principle judgment amount, and on attorney fees, costs and other recovery amounts, at the rate of 5.125 percent per annum from the date of entry of this judgment until said judgment is paid.

8. **Attorney for Judgment Debtor:** Dan'l W. Bridges, 11100 NE 8th Street, Suite 300 Bellevue, W A 98004

II. JUDGMENT

This matter was tried to a jury of 12 before the Honorable Roseanne Buckner beginning on March 28, 2005. Plaintiffs, James, Deborah and Cassandra Sharbono, appeared personally or through their attorney, Timothy R. Gosselin. Defendants Universal Underwriters Insurance Company, Len Van de Wege and "Jane Doe" Van de Wege appeared personally or through their attorney Dan'l W. Bridges.

On December 27, 2002, January 24,2003, May 2, 2003 and March 28, 2005, the court entered orders on motions for full or partial summary judgment resolving certain issues and claims. During trial, the court dismissed the claims against defendants Van de Wege, and dismissed the claims of Cassandra Sharbono for general damages. During trial the court also determined as a matter of law that Universal Underwriters Insurance Company was obligated to pay the unpaid portion of the Judgment by Confession entered on March 30, 2001 in the matter of *Tomyn v. Sharbono*, Pierce County Cause No. 99-2-12800-7.

Following trial on the merits on the issues of whether Universal Underwriter's bad faith and violations of Washington's Consumer Protection Act were a proximate cause of injury and damage to the plaintiffs, the jury returned a verdict in favor of the plaintiffs. A copy of the verdict is attached hereto and incorporated herein. Also following trial, the court made additional rulings regarding attorney fees, costs and other relief. Based upon these rulings, decisions and the verdict of the jury, the

BURGESS FITZER, P.S.
ATTORNEYS AT LAW
1501 MARKET STREET, SUITE 300
TACOMA, WASHINGTON 98402-3333
(253) 572-5324 FAX (253) 627-8928

court hereby enters judgment against Universal Underwriters Insurance Company as follows:

1. Judgment is hereby entered in favor of plaintiffs and against defendant Universal Underwriters Insurance Company in the amount of the unpaid balance of the Judgment by Confession entered against plaintiffs in the matter of *Tomyn v. Sharbono*, Pierce County Cause No. 99-2-12800-7, to wit $3,275,000.00, together with interest that has accrued thereon since the date of entry, March 30, 2001, which, as of May 13, 2005, (four years, 43 days @ 12 %/yr.) totals $ 1,618,298.63, and together with interest that continues to accrue thereon as set forth in said judgment until said judgment is paid.

2. Judgment is hereby entered in favor of plaintiffs James and Deborah Sharbono and against defendant Universal Underwriters Insurance Company in the additional sum of $4,500,000.00, as and for past and future general and special damages as found by the jury.

3. Judgment is hereby entered in favor of plaintiffs and against defendant Universal Underwriters Insurance Company for punitive damages pursuant to RCW 19.86.090 in the amount of $ 10,000.00 KK.

4. Judgment is hereby entered in favor of plaintiffs and against defendant Universal Underwriters Insurance Company in the additional sum of $ 203,585.00 KK for actual attorney fees.

5. Judgment is hereby entered in favor of plaintiffs and against defendant Universal Underwriters Insurance Company in the additional sum of $ 505.00 KK for costs.

6. ~~Judgment is hereby entered in favor of plaintiffs James and Deborah Sharbono and against defendant Universal Underwriters Insurance Company in the additional sum of $_____ to compensate said plaintiffs for the increased income tax due and owing as a result of receipt of payment of damages in a lump sum.~~

7. Amounts awarded pursuant to paragraph 1 shall bear post-judgment interest pursuant to RCW 4.56.110(4) and RCW 19.52.020 at the rate of 12 percent per annum. Amounts awarded pursuant to paragraphs 2 through 6 shall bear post-judgment interest pursuant to RCW 4.56.110(3) at the rate of 5.125 percent per annum.

BURGESS FITZER, P.S.
ATTORNEYS AT LAW
1501 MARKET STREET, SUITE 300
TACOMA, WASHINGTON 98402-3333
(253) 572-5324 FAX (253) 627-8928

Signed this 20th day of May, 2005.

HONORABLE ROSANNE BUCKNER

PRESENTED BY:

BURGESS FITZER, P.S.

By: _____
TIMOTHY R. GOSSELIN, WSBA# 13730
Attorney for Plaintiffs

APPROVED AS TO FORM; NOTICE OF PRESENTATION WAIVED.

LAW OFFICES OF DAN'L W. BRIDGES

By: _____
DAN'L W. BRIDGES, WSBA# 24179
Attorney for Defendants

FILED
DEPT. 6
IN OPEN COURT
MAY 20 2005
Pierce County Clerk
By _____ DEPUTY

BURGESS FITZER, P.S.
ATTORNEYS AT LAW
1501 MARKET STREET, SUITE 300
TACOMA, WASHINGTON 98402-3333
(253) 572-5324 FAX (253) 627-8928

DECLARATION OF SERVICE

On said day below, I deposited in the U. S. mail a true and accurate copy of the following documents: Motion for Leave to Submit Over-Length Brief and Brief of Appellant, Court of Appeals Cause No. 33379-1-II to the following:

Dan'L W. Bridges
Attorney at Law
11100 Northeast 8th Street, #300
Bellevue, WA 98004-2912

Michael A. Barnes
Sonnenschein Nath & Rosenthal LLP
685 Market Street, 6th Floor
San Francisco, CA 94105

By ABC Legal Messenger to:
Timothy R. Gosselin
Burgess Fitzer, P.S.
1145 Broadway, Ste. 400
Tacoma, WA 98402-3584

Original filed with:
Court of Appeals, Division II
950 Broadway, Ste. 300
Tacoma, WA 98402

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: March 6, 2006, at Tukwila, Washington.

Christine Jones

Christine Jones
Legal Assistant
Talmadge Law Group PLLC